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THESIS

**EXPANSION OF U.S. IMMIGRATION AND CUSTOMS
ENFORCEMENT'S CRIMINAL ALIEN PROGRAM IN THE
WAR ON TERROR**

by

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December 2008

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CRIMINAL ALIEN PROGRAM IN THE WAR ON TERROR**

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ABSTRACT

The continued presence of criminal aliens, non-citizens present in the United States either legally or illegally, poses a significant threat to the security of this Nation. While criminal aliens are present at all levels of our criminal justice system, ICE's current criminal alien program only addresses criminal aliens encountered at the state and federal level. This thesis examines how the Criminal Alien Program can be expanded at the local and county level, the possible effects this expansion will have upon ICE in detaining and removing criminal aliens and whether this removal of criminal aliens is an effective and efficient weapon in a terrorist prevention strategy. Individuals from the Joint Terrorism Task Force and NYC Police Department's Shield were interviewed concerning whether the efficient removal of criminal aliens is an effective tool in the war on terror. In researching this thesis of expansion of ICE's Criminal Alien Program and the issues that arise from such expansion, structured formal interviews were conducted of a representative mix of ICE field officials varying in size and physical location in the United States. The creation of a megacommunity amongst the stakeholders involved in ICE's Criminal Alien Program should be included in U.S. counterterrorism strategy.

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I. INTRODUCTION

The continued presence of criminal aliens, non-citizens present in the United States either legally or illegally, poses a significant threat to the security of this Nation. Punishing wrongdoers through the application of the rule of law is a central principle to the National Strategy to Combat Terrorism, whether these wrongdoers are masterminds of terrorist attacks or mere foot soldiers.¹ Criminal aliens have the potential to become leaders and foot soldiers in the war on terror. Whether it is through their own radicalization in the prison environment or financially supporting terrorists through criminal activity, criminal aliens represent a viable threat to the homeland. Reducing criminal aliens' presence in the United States reduces the number of potential candidates who could support terrorist groups.

Criminal aliens are encountered within every level of the U.S. criminal justice system whether it is federal, state or local. In a real sense, criminal aliens are a captive audience. They do not need to be tracked down or located. They are literally sitting in prison doing their time. They are being housed and fed by the criminal justice system, they have been photographed, fingerprinted, and catalogued, and they cannot leave the prison walls without permission. Immigration and Customs Enforcement (ICE) needs to take full advantage of this situation to remove them from the United States and neutralize this potential threat to our national security. Unfortunately, for years, immigration authorities have struggled to design and implement a system that would fulfill this obligation. In this thesis, I argue that expansion of ICE's Criminal Alien Program (CAP) could provide an optimal strategic response.

A. THE PROBLEM

While criminal aliens are present at all levels of our criminal justice system, ICE's current CAP only addresses criminal aliens encountered at the state and federal level.²

¹ National Strategy for Combating Terrorism, September 2006, 9-13, <http://www.whitehouse.gov/nsc/nsct/2006/sectionV.html> (accessed December 2008).

² ICE Fact Sheet, "Secure Communities," (Washington, D.C., March 2008), http://www.ice.gov/pi/news/factsheets/secure_communities.htm (accessed March 2008).

Currently, ICE's CAP involves only ten percent of criminal aliens encountered at the local level.³ While criminal aliens are in local law enforcement's custody for a significant period of time, in many jurisdictions, local law enforcement does not consider a criminal's immigration status. If an alien is encountered at the local level of the criminal justice system, it is left to the individual law enforcement officer to make an Immigration Alien Query (IAQ) through the National Law Enforcement Telecom (NLET) database.⁴ Regardless of whether this inquiry is made, the criminal alien is often simply released from local law enforcement's custody after serving their sentence. They are not referred to ICE let alone detained. Indeed some local law enforcement do not even query the immigration status of its inmates. Instead, these individuals are released back into the general population where they often commit more crimes, including crimes that may financially support terrorist networks. An effective criminal alien removal program would deport them from the United States before they had another chance to damage the Nation.

ICE and the legacy Immigration and Naturalization Service (INS) have many long-standing relationships with local law enforcement. However, ICE lacks working relationships with a large number of local law enforcement offices. Additionally, a lack of bed-space and the manpower needed to detain these individuals hinders ICE's abilities to deport these criminal aliens. If an alien is encountered and referred to ICE, the aliens are often released from custody if they have not been convicted of an aggravated felony.⁵ While the aliens are told to return for their hearing before an Immigration Judge, many abscond after they realize that they have no relief from removal and little chance to remain in the United States. These absconders slip back into society never to be found again because, while ICE devotes significant resources to its fugitive operations teams, it does not have the manpower to locate these fugitives. According to an audit conducted

³ ICE Fact Sheet, "Secure Communities," (Washington, D.C., March 2008), http://www.ice.gov/pi/news/factsheets/secure_communities.htm (accessed March 2008).

⁴ The Law Enforcement Service Center (LESC) has been tasked with responding to local law enforcement inquiries since 1998.

⁵ An aggravated felony is defined at Section 101(43)(a) of the Immigration and Nationality Act. U.S. Congress, Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101, et seq. (2000)).

by the Office of Inspector General in 2006, “most of th[e] incarcerated aliens are being released into the U.S. at the conclusion of their respective sentences because ICE’s Detention and Removal Office (DRO)⁶ does not have the resources to identify, detain and remove these aliens under its Criminal Alien Program.”⁷

When criminal aliens are not identified and removed by ICE, many continue to pose a significant threat to the American public as they go on to commit further crimes. The statistics on recidivist rates amongst the immigrant population are staggering. A 2005 Government Accountability Office (GAO) study found that 55,322 criminal aliens were arrested in the United States a total of at least 459,614 times, averaging over eight arrests per alien; almost all of the aliens studied had more than one arrest.⁸

These crimes often go on to financially support terrorist networks as there are established links between crime and the funding of terrorism. In testimony before the Senate Judiciary Committee in May 2003, Steven McGraw, the Assistant Director of the Federal Bureau of Investigation’s (FBI) Office of Intelligence stated that “international drug trafficking is a highly lucrative enterprise generating billions of dollars in profit that terror groups can easily tap into, and that most if not all terror groups obtain financing from drug trafficking.”⁹ Just one example of the link between criminal aliens’ involvement in the drug trade facilitating terrorist activities can be found in the case of two Pakistani nationals who were arrested in 2002 when they attempted to exchange a large quantity of drugs for cash and anti-aircraft weapons that were to be used to support

⁶ DRO is one of ICE’s four integrated divisions whose responsibilities include ensuring the departure of removable aliens through the enforcement of existing immigration laws. U.S. Immigration & Customs Enforcement, “ICE Office of Detention and Removal,” News (November 2, 2006), <http://www.ice.gov/pi/news/factsheets/dro110206.htm> (accessed November 2008).

⁷ “Detention and Removal of Illegal Aliens,” Department of Homeland Security, Office of Inspector General, OIG-06-33, April 2006, 2.

⁸ Government Accounting Office, “Information on Certain Illegal Aliens Arrested in the United States,” May 9, 2005, <http://www.gao.gov/docsearch/abstract.php?rptno=GAO-05-646R> (accessed September 2007).

⁹ “NARCO-Terrorism: International Drug Trafficking and Terrorism--A Dangerous Mix,” Hearing before the Committee on the Judiciary, United States Senate, One Hundred Eighth Congress, First Session, May 20, 2003.

al Qaeda.¹⁰ Gang activity has also been linked to terrorism. Many of these gangs are populated by foreign-born individuals. MS 13 is one example of a transnational gang whose members are predominantly foreign born.¹¹ While there is no substantiated direct link between MS 13 and al Qaeda, these transnational gangs still represent a threat to our national security.¹² Funding for terrorism would be disrupted with the increase in deportation of criminal aliens. This disruption of funding could lead to the dissolution of terrorist networks.

With the expansion of CAP, the criminal justice system can be used as a deterrent in a terrorism prevention strategy. Certainty of removal from the United States after serving a criminal sentence is an effective and efficient weapon in the war on terror. Removal of criminal aliens must be seen as more than just the removal of a criminal element from society through enforcement of immigration laws. It must be seen by national security strategists as essential to this Nations' counterterrorism strategy. By processing someone through ICE's databases, a removal would document their identities and thereby prevent any attempted legal reentry into the United States.

Removing criminal aliens from the United States also removes a potential radicalized element from society. Prisons are fertile ground for radicalization due to its isolating nature. If these criminal aliens were removed from the United States prior to their release from prison, they would be unable to act upon any radical ideas gained in prison or spread these radical ideas to their ethnic communities within the United States.

B. RESEARCH QUESTION

This thesis examines whether the removal of criminal aliens is an effective and efficient weapon in a terrorist prevention strategy, how ICE's CAP can be expanded at the local and county level and the possible effects this expansion will have upon ICE in

¹⁰ "NARCO-Terrorism: International Drug Trafficking and Terrorism--A Dangerous Mix," Hearing before the Committee on the Judiciary, United States Senate, One Hundred Eighth Congress, First Session, May 20, 2003, 3.

¹¹ Michael J. Garcia, Assistant Secretary, Immigration and Customs Enforcement, "Immigration and the Alien Gang Epidemic: Problems and Solutions," Statement before the House Committee on the Judiciary Subcommittee on Immigration, Border Security and Claims, April 13, 2005, 2.

¹² *Ibid.*, 5.

detaining and eventually removing criminal aliens. In order to respond to this primary set of questions, this thesis also seeks to address the following secondary questions:

- How do Homeland Security strategists view actual removal of criminal aliens in the strategy of terrorism prevention?
- How receptive are local and county officials to the idea of screening their defendants and inmates regarding their immigration status and referring them to ICE for possible removal?
- How can the use of incentives as well as training be used to influence the “buy in” of state and local officials to the expansion of the criminal alien program?
- How can the number of illegal immigrants encountered at the local and county level justify expanding ICE’s criminal alien program or is any number of criminal aliens encountered sufficient?
- How will ICE’s management of bed-space issues affect the expansion of ICE’s criminal alien program at the state and local level?
- How can alternative solutions be used to alleviate ICE’s bed-space issues that would allow for the expansion of the criminal alien program at the state and local level?

C. LITERATURE REVIEW

Immigration in general is a hot-button topic that has resulted in a plethora of written material addressing a myriad of issues from a variety of perspectives. Much has been written on the topic in general resulting in very polarized opinions being expressed. Those opinions range from advocating very restrictive immigration policies to advocating an open door immigration policy. Throughout history, public opinion as well as those of politicians varies depending upon the health of the United States’ economy, current crime statistics, and perceived threats to national security. Historically, public opinion influences political actions in enacting either permissive or restrictive immigration laws.

This literature review focuses upon what has been written about criminal aliens over the last twelve years subsequent to congressional enactment of overhauling immigration legislation in 1996 that resulted in restrictive immigration consequences for criminal behavior.

1. Criminal Aliens and Their Rights under U.S. Immigration Law

Immigration statutes and regulations provide the framework of laws that must be enforced by ICE. As a component of the Department of Homeland Security, the assistant secretary of ICE has been delegated the authority to oversee the enforcement of these laws and regulations. Historically, Congress has taken very seriously the threat that criminal aliens pose to the security of the United States. With each statute enacted that effects immigration, the rights of criminal aliens have shrunk considerably. A person who committed a crime in the United States could once get a second chance to stay in this country at the discretion of an Immigration Judge. No longer is this the case. Congress eliminated most forms of discretionary relief for criminal aliens with the enactment of both the Antiterrorism and Effective Death Penalty Act (AEDPA)¹³ and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA)¹⁴ in 1996. Indeed, once a person has committed an aggravated felony as defined under the Immigration and Nationality Act,¹⁵ a removal order from the United States is almost a certainty.

The Immigration and Nationality Act was amended to include mandatory detention requirements for certain criminal aliens whereby aliens convicted of certain crimes cannot be released into the population after completion of their prison sentence. Rather, the Immigration and Nationality Act mandates that certain criminal aliens be detained by ICE pending resolution of their immigration status.¹⁶ The mandatory detention laws severely impacted how ICE conducted their daily operations. Resources had to be redirected to manage the large number of criminal aliens now subject to mandatory detention.

¹³ U.S. Congress, The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996).

¹⁴ U.S. Congress, The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

¹⁵ U.S. Congress, Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101, et seq. (2000)).

¹⁶ *Ibid.*, § 236(c).

The sweeping changes enacted by Congress in 1996 had an incredibly adverse effect upon lawful permanent residents who committed crimes in the United States. This across-the-board change meant that numerous lawful permanent residents, also known as green card holders, would be deported because of their crimes since they were no longer eligible for any form of discretionary relief that would permit them to remain in the country – something traditionally available to criminal lawful permanent residents prior to 1996.¹⁷ It also increased the number of criminal aliens ICE would have to remove from the United States.

A CRS Report explores the history of immigration laws and the immigration consequences for the criminal alien.¹⁸ It attempts to take an objective and informative stance without arguing the benefits or the negatives of existing harsh laws. Other scholarly sources question the constitutionality of our immigration laws and examine the real world ramifications of being a criminal alien. Removal itself is often seen as a punishment linking it to the criminal justice system thus potentially making criminal aliens worthy of more rights and protection under the Constitution.¹⁹

There also exist numerous sources that focus upon the enforcement of immigration laws overall without focusing on criminal aliens. One such article is found

¹⁷ Lawful permanent residents who committed crimes in the United States prior to 1996 were eligible for what's commonly known as a 212(c) waiver. *Ibid.*, § 212(c). In a 212(c) waiver hearing, an Immigration Judge determines whether the criminal alien would be permitted to remain in the United States by essentially weighing the good things about a person (length of residence, employment history, familial ties, etc.) against the bad things about a person (criminal history).

¹⁸ Michael John Garcia and Larry M. Eig, "Immigration Consequences of Criminal Activity," CRS Report for Congress, Congressional Research Service, Library of Congress, October 23, 2006, <http://fpc.state.gov/documents/organization/75248.pdf> (accessed November 2007).

¹⁹ Daniel Kanstroom, "Deportation, Social Control and Punishment: Some Thoughts About Why Harsh Laws Make Bad Cases," *Harvard Law Review* 113, no. 8 (June 2000): 1890-1935.

in the *Federal Lawyer*.²⁰ It discusses challenges faced by ICE in regard to detention space but focuses upon border issues more than criminal aliens. It explores the DRO's endgame strategy and the steps taken to achieve the endgame.²¹

An article representative of the more liberal stance is a Georgetown Immigration Law Journal article that examines the impact of AEDPA and IIRAIRA upon lawful permanent residents who commit crimes.²² It begins this exploration with a sympathetic tale of woe of a refugee from Afghanistan who came to the United States with his family at the age of three. The article goes on to enumerate the equities the Afghani had in the United States that included parents diagnosed with cancer. However, the American immigration laws left no room for discretion mandating that this lawful permanent resident be deported and separated from his family simply because he sold drugs in the United States.²³

Similarly, sympathetic stories of warrantless raids by ICE coupled with the apprehended individuals being detained at an out-of-state facility can be found throughout the literature.²⁴ When ICE raids occur, immigrant rights are a predominant

²⁰ Joseph Summerill, "Is Federal Immigration Detention Space Adequate? The Challenges Facing ICE's Custody and Detention Management Efforts," *The Federal Lawyer*, May 2007, 38, <http://www.gtlaw.com/pub/articles/2007/summerill07a.pdf> (accessed November 2007).

²¹ Joseph Summerill, "Is Federal Immigration Detention Space Adequate? The Challenges Facing ICE's Custody and Detention Management Efforts," *The Federal Lawyer*, May 2007, 38, <http://www.gtlaw.com/pub/articles/2007/summerill07a.pdf> (accessed November 2007).

²² Sara A. Rodriguez, "Exile and the Not-So-Permanent Legal Resident: Does International Law Require a Humanitarian Waiver of Deportation for the Non-Citizen Convicted of Certain Crimes?," *Georgetown International Law Journal* 20 (Spring 2006): 483.

²³ Ibid.

²⁴ Julia Preston, "No Need for a Warrant, You're an Immigrant," *The New York Times*, October 14, 2007, http://www.nytimes.com/2007/10/14/weekinreview/14preston.html?_r=1&adxnnl=1&adxnnlx=1194753935-HesktSibHqEX/Ct1oBgxbw (accessed November 2007).

theme in many articles.²⁵ When mainstream media does focus on detaining immigrants, it most often focuses upon detaining illegal immigrants on the southern border.²⁶

2. ICE Resources

While Congress enacted immigration statutes that provide the framework of how the government must handle criminal aliens, Congress did not provide the requisite resources to ensure successful implementation of these laws. In other words, while the laws exist, resources such as bed-space and personnel needs remain a significant impediment to complying with congressional intent. Indeed, a 2006 audit of ICE's detention and removal of aliens by the Office of Inspector General found that mandatory detention limited DRO's ability to detain aliens who pose a potential national security or public safety risk but do not necessarily qualify as mandatory detainees.²⁷ It is estimated that "DRO would need an additional 34,653 detention beds with a projected cost of 1.1 billion to detain and remove" all aliens from state sponsored terrorism countries (SST) or who originate from special interest countries (SIC) or countries that "promote, produce or protect terrorist organizations and their members" and CAP aliens.²⁸

The Office of Inspector General found that ICE is currently unable to remove physically from the U.S. all removable aliens – both criminals and non-criminals.²⁹ While ICE apprehends individuals, 36% of those individuals were released due to lack of personnel, bed-space and funding needed to detain them during their pending immigration proceedings.³⁰ Indeed, this is not a new problem. As early as 1996, the

²⁵ Pam Belluck, "Lawyers Say U.S. Acted in Bad Faith after Immigrant Raid in Massachusetts," *The New York Times*, March 22, 2007, http://www.nytimes.com/2007/03/22/washington/22mass.html?_r=1&oref=slogin (accessed November 2007).

²⁶ Rachel L. Swarns, "Plan Met with Warnings that it Won't be Enough," *The New York Times*, May 16, 2006, <http://www.nytimes.com/2006/05/16/washington/16guard.html> (access November 2007).

²⁷ "Detention and Removal of Illegal Aliens," Department of Homeland Security, Office of Inspector General, OIG-06-33, April 2006, 5.

²⁸ *Ibid.*, 2.

²⁹ *Ibid.*, 1.

³⁰ *Ibid.*

Office of Inspector General cited the shortage of detention bed-space as impacting the Department of Justice's ability to physically remove aliens with final orders of removal.³¹

To increase ICE's ability to detain criminal aliens that are encountered, DRO has been piloting two programs that are alternatives to physical detention for non-criminal aliens and non-mandatory detention criminal aliens. The Intensive Supervision Appearance Program (ISAP) has been piloted since June 2004 and involves an alien regularly checking in with ICE – similar to the parole system employed by the Bureau of Prisons.³² The Electronic Monitoring Device Program (EMD) has been piloted since May 2003 and employs the use of an ankle bracelet to monitor an alien's whereabouts.³³ The Office of Inspector General has criticized DRO for the length of time it has taken to pilot these programs without developing recommendations for their implementation.³⁴ Currently, ICE implemented ISAP in twelve cities nationwide and implemented its Enhanced Supervision/Reporting (ESR) in 27 DRO offices.³⁵ These are valid alternatives to simply releasing aliens into the U.S. population. The ESR program provides the closest monitoring of aliens and, depending upon the type and security level of the detention facility, does not have the costs associated with a traditional detention facility.

Several articles written by the Heritage Foundation discuss the problems of enforcement of immigration laws and offer of solutions. A particularly interesting article advocates for the enforcement of current existing immigration laws without throwing

³¹ "Detention and Removal of Illegal Aliens," Department of Homeland Security, Office of Inspector General, OIG-06-33, April 2006, 3.

³² Ibid., 25.

³³ Ibid.

³⁴ Ibid.

³⁵ ICE Fact Sheet, "Alternatives to Detention," November 26, 2008, <http://www.ice.gov/pi/news/factsheets/080115alternativestodetention.htm?searchstring=alternatives%20AND%20detention> (accessed December 2008).

further money at the problem.³⁶ The problem of enforcement of those laws may require additional funds – Congress often enacts laws without great thought to the real world implications of its legislation.

Another article by the Heritage Foundation explores the problems ICE encounters in housing mandatory detention aliens.³⁷ It specifically states that the speed at which someone is deported must be addressed to decrease the need for bed-space.³⁸ However, what this article fails to address is how to increase the speed at which someone is deported.

Another topic that is extensively covered in the literature is government waste. A New York Times article in 2002 was more concerned about government waste than the number of criminal aliens who are not identified and removed by Immigration authorities.³⁹

3. ICE's Criminal Alien Program

ICE's Criminal Alien Program is a relatively new name for a compilation of several pre-existing programs under one umbrella program. The Institutional Removal Program (IRP) and the Alien Criminal Apprehension Program (ACAP) are all merged into CAP.⁴⁰ The expansion of CAP can be most effective in the realm of the former IRP. The IRP was a “national program that aims to: (1) identify removable criminal aliens in

³⁶ James Jay Carafano, “Throwing Money at the Problem No Solution to Immigration and Border Security,” *The Heritage Foundation*, June 15, 2007, <http://www.heritage.org/Research/Immigration/wm1508.cfm> (accessed November 2007).

³⁷ James Jay Carafano, “Safeguarding America’s Sovereignty: A System of Systems’ Approach to Border Security,” *The Heritage Foundation*, November 28, 2005, <http://www.heritage.org/Research/HomelandSecurity/bg1898.cfm> (accessed November 2007).

³⁸ Ibid.

³⁹ Christopher Marquis, “Threats and Responses; Report Finds Lapses in Program to Deport Criminal Immigrants,” *The New York Times*, October 8, 2002, <http://query.nytimes.com/gst/fullpage.html?res=9F06EFD9103BF93BA35753C1A9649C8B63> (accessed November 2007).

⁴⁰ “Detention and Removal of Illegal Aliens,” Department of Homeland Security, Office of Inspector General, OIG-06-33, April 2006, 14.

federal, state and local correctional facilities, (2) ensure that they are not released into the community, and (3) remove them from the United States upon completion of their sentences.”⁴¹

The Office of Inspector General issued a report about the State Criminal Alien Assistance Program (SCAAP) that is directly linked to the possible expansion of ICE’s CAP. SCAAP is a payment program whereby states and localities that have certain criminal aliens in their custody based on state or local charges and convictions are eligible to receive federal assistance.⁴² If county officials start identifying and tracking aliens in their custody, budgetary concerns might be alleviated with the receipt of SCAAP funds. Additionally, local authorities who already receive SCAAP funds should be required to cooperate with ICE in removal efforts.⁴³ It has even been suggested that these SCAAP funds be distributed on a graduated scale dependent upon the local authority’s cooperation with ICE.⁴⁴

With expanding local law enforcement’s role in identifying criminal aliens, there remains concern about ICE’s enforcement efforts impinging on civil rights. An article in the *Connecticut Law Review* explores the blurring of the line between criminal aliens and threats to national security.⁴⁵ It warns against knee-jerk reactions to illegal immigrants due to any alleged threat to national security. It argues that removing criminal aliens will not cause a decrease in domestic crime nor will it deter further illegal immigration. It also warns against the ever shrinking of civil liberties of immigrants in the United States.⁴⁶

⁴¹ “Cooperation of SCAAP Recipients in the Removal of Criminal Aliens from the United States,” U.S. Department of Justice, Office of Inspector General, Audit Report 07-07 (redacted – public version), January 2007, 6.

⁴² *Ibid.*, i.

⁴³ *Ibid.*, 7.

⁴⁴ *Ibid.*, 9.

⁴⁵ Jennifer M. Chacon, “Unsecured Borders: Immigration Restrictions, Crime Control and National Security,” *Connecticut Law Review* 39 (July 2007): 1827.

⁴⁶ *Ibid.*

This article conflates migrant workers, criminal aliens and terrorists. In addition, the article is critical of the immigration laws enacted since 9/11 as not being effective in identifying and removing terrorists.⁴⁷ In support of her argument, the author also places great weight upon the lack of non-citizens being removed from the United States on national security grounds.⁴⁸ Finally, in attacking the removal of criminal aliens, the author argues that any threat to the United States is not removed simply by removing the alien from within this Nation's borders.⁴⁹

A more conservative article that explores possible solutions regarding the removal of criminal aliens is found in the *Harvard Journal of Law and Public Policy*.⁵⁰ It explores the numerous problems encountered when attempting to remove criminal aliens from management issues to funding issues. The article advocates for a more cohesive approach that incorporates the aid of local law enforcement. It advocates for state and local law enforcement to take an active role in the removal of criminal aliens without relying on actions by federal authorities.⁵¹

When a high profile crime occurs involving an illegal alien or someone who should have been deported long ago, media attention focuses upon ICE's failure to remove criminal aliens from the United States. It also becomes newsworthy if a particularly scathing governmental report emerges concerning ICE's ineffectiveness at removing criminal aliens. Such was the case in 2006 when the *New York Times* published an extensive article concerning criminal aliens encountered by law enforcement at the local level.⁵² This article in particular documented the efforts of one local sheriff in reaching out to ICE officials to prevent criminal aliens from being simply released to the streets upon completion of their sentence.

⁴⁷ Jennifer M. Chacon, "Unsecured Borders: Immigration Restrictions, Crime Control and National Security," *Connecticut Law Review* 39 (July 2007): 1858.

⁴⁸ *Ibid.*, 1831, 1860.

⁴⁹ *Ibid.*, 1875.

⁵⁰ Peter H. Shuck and John Williams, "Removing Criminal Aliens: The Pitfalls and Promises of Federalism," *Harvard Journal of Law and Public Policy* 22 (Spring 1999): 367.

⁵¹ *Ibid.*

⁵² Julia Preston, "New Scrutiny of Illegal Immigrants in Minor Crimes," *The New York Times*, June 20, 2006, <http://www.nytimes.com/2006/06/20/us/20jails.html?pagewanted=1> (accessed November 2007).

A high profile triple murder committed by illegal aliens in Newark caused much debate in the media concerning illegal immigrants and law enforcement. Three college students were murdered execution style on a playground by illegal aliens – one of whom had previously been in the criminal justice system.⁵³ That illegal alien should have never been released to the streets but instead been referred to ICE. The Newark murders prompted the New Jersey Attorney General to issue guidelines regarding the mandatory referral to ICE of foreign-born individuals encountered by law enforcement in New Jersey.⁵⁴

D. ARGUMENT

Removal of criminal aliens is an effective and efficient tool in a strategy to prevent terrorism. ICE's best opportunity to remove criminal aliens exists when they are serving their time in prison. Accordingly, the CAP must be expanded to ensure ICE's presence at all levels of criminal justice systems. New procedures must be established that will necessitate cooperation between local, state and federal authorities. Most importantly, in order to enforce the immigration laws to their fullest extent against criminal aliens, the "Catch and Release" policy⁵⁵ must cease.

Because additional criminal aliens will be detained and incarcerated with the expansion of CAP, the issue of limited bed-space must also be addressed. There exist several possible strategies to circumvent bed-space issues and eliminate the "Catch and Release" policy. First, ICE must attempt to resolve the criminal alien's removal proceedings fully in Immigration Court prior to their release from incarceration. Second,

⁵³ Kareem Fahim, "Newark Triple Murder Fuels Debate on Treatment of Illegal Immigrants," *The New York Times*, August 19, 2007, <http://www.nytimes.com/2007/08/19/nyregion/19newark.html?n=Top/News/U.S./U.S.%States,%20Territories%20and%20Possessions/New%20Jersey/Newark> (accessed October 2008).

⁵⁴ Attorney General Law Enforcement Directive No. 2007-3, Anne Milgram, New Jersey Attorney General, August 22, 2007.

⁵⁵ ICE and legacy INS' policy of "Catch and Release" referred to the common practice of releasing non-Mexican aliens encountered by ICE at Mexican border. This policy ceased in 2006 with the opening of a 500 bed ICE detention facility in Texas used to detain those encountered at the border. U.S. Immigration & Customs Enforcement, "ICE Office of Detention and Removal," *News* (November 2, 2006), <http://www.ice.gov/pi/news/factsheets/dro110206.htm> (accessed November 2008). However, the policy of law enforcement encountering criminal aliens at the local level and releasing them can be seen as a new "Catch and Release" policy.

ICE should increase the use of Stipulated Removals and Administrative Removals to resolve a criminal alien's immigration case by using motion papers and not a hearing before an Immigration Judge. Stipulated Removals involve aliens who merely want to return to their home country; this is accomplished all on paper without a formal hearing. Administrative Removals do not involve a hearing before the Immigration Judge and can only be employed where the alien was not inspected or admitted into the United States and has been convicted of an aggravated felony. Third, ICE should increase the use of incentives for aliens to accept final orders of removal such as getting out of jail early to be deported. Fourth, the current procedure to obtain travel documents necessary to deport criminal aliens must be revamped so that it does not lengthen the time an alien remains in ICE's custody. Finally, alternatives to detention such as electronic monitoring must be employed against other non-mandatory detention aliens to make room in detention facilities for these criminal aliens.

While recidivism rates are important for criminal aliens who are not identified and removed by ICE, it is equally important to realize that these criminal aliens provide an underlying network of crime that economically funds terrorism. History is filled with examples of criminal activity financially supporting terrorism examples of which are explored in Chapter IV of this thesis. Moreover, these criminal aliens are ripe for radicalization in our prisons. Admittedly, there are no known examples of criminal aliens becoming radicalized in prison going on to commit terrorist acts. However, history provides examples of individuals being radicalized in the prison environment, regardless of their immigration status. These examples are explored in Chapter III of this thesis.

ICE's CAP should expand beyond state and federal prisons to reach all county and local jail facilities throughout the United States. This will entail streamlining the intake process of county and local prisoners such that foreign-born inmates are identified. Their staff will require training to develop standard intake questions for all inmates. All incarcerated persons must be queried as to their place of birth and their citizenship. These officials should also be trained to compare the place of birth listed on the inmate's arrest report, pre-sentence report and RAP sheet. A specific query into the person's immigration status would also be beneficial.

County and local officials must be given the contact information for the appropriate ICE office so that the given protocol is followed. Once the foreign-born inmates are identified, a procedure must be established whereby ICE agents are given access to interview the inmates as soon as they enter the criminal justice system. ICE must also be given access to official records within the files that can be used to establish a criminal alien's removability. County and local officials must be trained to abide by any ICE detainer that is lodged and to contact ICE prior to the release of these criminal aliens.

The training of county and local officials will require an expenditure of funds that may not necessarily be available. However, local officials' cooperation with ICE may entitle them to receive funds under the SCAAP.⁵⁶ Local officials may also be able to obtain training under the 287(g) provisions of the Immigration and Nationality Act.

By referring cases to ICE, the actual removal of the criminal aliens who commit crimes will be accomplished. Given the high rate of recidivism amongst criminal aliens, a corresponding decrease in the crime rate may result with the removal of these aliens. A decreased crime rate also has the capacity to affect local budgetary concerns positively.

ICE may encounter an increased demand for bed-space with the expansion of the CAP that may impact existing detention budgets. Expansion of the CAP will not necessarily result in an increase demand for bed-space if certain actions are taken. There are several strategies that can be employed to avoid the bed-space issue altogether or at least minimize the amount of time a criminal alien spends in ICE's custody.

1. Increase Immigration Court Hearings within the State and Local Jails

Expansion of the CAP should also involve the expansion of Immigration Court hearings conducted while the inmate is incarcerated. These criminal aliens are housed by another entity and do not become ICE's bed-space problem until they have completed serving their sentence. The complete resolution of a criminal alien's immigration case prior to their release is an integral part of avoiding the creation of a bed-space problem.

⁵⁶ This program is funded by the Department of Justice.

A criminal alien must be placed into removal proceedings as soon as the inmate is incarcerated. This will maximize the amount of time the criminal alien spends in county and local custody to resolve the immigration hearing and any subsequent appeals.

An increase in the IRP program will necessarily involve the Department of Justice and its Executive Office for Immigration Review (EOIR) – the agency under which the Immigration Court lies. EOIR’s budget may increase due to an increase in personnel needed to adjudicate all of the immigration cases under the new expanded CAP. However, existing personnel may be sufficient to handle the increased caseload.

Expansion of the CAP to all county and local jails may also be met with opposition from local law enforcement. Indeed, cities like San Francisco that consider themselves “sanctuary” cities have historically not cooperated with ICE’s efforts to identify and remove criminal aliens.⁵⁷ Any opposition can be mitigated with proper education and training of local law enforcement. While some cities may be more difficult than others, it must be brought to light that securing the homeland requires cooperation with ICE’s efforts to remove criminal aliens from the United States.

2. Increase the use of Stipulated and Administrative Removals

Stipulated removals are another way to ensure the complete resolution of a criminal alien’s immigration case prior to his release from custody. Current practice requires a criminal alien’s actual appearance before an Immigration Judge regardless of whether the alien simply wants to accept an order of removal and return to his native country. A stipulated removal would involve motion papers executed by the alien and submitted to the court. In essence, the alien waives all of his rights and requests an order of removal. A significant problem with this process is that aliens often do not have legal representation. One could argue that the alien could be the subject of coercion and abuse. This could be minimized with training of the ICE agents to effectively communicate with

⁵⁷ Department of Justice, Office of Inspector General, “Cooperation of SCAAP Recipients in the Removal of Criminal Aliens from the United States,” Audit Report 07-07 (redacted – public version), January 2007, ix.

unrepresented aliens involved in the stipulated removal process. Additionally, ICE should also focus its efforts on educating EOIR on the steps it already takes to ensure that aliens who stipulate to removal do so voluntarily.

Administrative removals are applicable to someone who entered the United States without inspection and has been convicted of an aggravated felony.⁵⁸ Once placed into administrative removal proceedings, the alien is processed for removal without seeing an Immigration Judge unless they state a claim for asylum.⁵⁹ As with stipulated removals, similar problems exist with the use of administrative removals. Unrepresented aliens must be processed in a fair manner which can only be accomplished through an emphasis on training of ICE agents regarding effectively communicating with those who are unrepresented.

3. Increase the Use of Incentives to Accept Final Orders of Removal

ICE announced the concept of Rapid REPAT (Removal of Eligible Parolees Accepted for Transfer) in March 2008.⁶⁰ The program allows for criminal aliens to be released from prison for the purposes of removal. However, this program requires state cooperation to exist. Currently only five states or territories are participating in such a program.

Long before Rapid REPAT was launched, New York instituted a Conditional Parole for Deportation Only program (CPDO) that allows for the deportation of inmates with final orders of removal prior to the completion of their criminal sentence.⁶¹ Existing since 1986, a Parole Board in New York has the authority to grant parole to non-citizens convicted of a non-violent offense who have final orders of removal even prior to completion of the inmate's minimum sentence. Criminal aliens would have the incentive

⁵⁸ Immigration and Nationality Act, §235(b), 8 U.S.C. § 1225.

⁵⁹ Ibid.

⁶⁰ ICE Rapid REPAT, Fact Sheet, March 26, 2008
<http://www.ice.gov/pi/news/factsheets/icerapidrepatri.htm> (accessed October 2008).

⁶¹ N.Y. Exec. L. [section]259-I(2)(d)(McKinney 1993).

of getting out of prison early if they do not fight their immigration case and accept a final order of removal. This ensures that the immigration case is resolved prior to their release from incarceration.

Arizona's program allowing for the parole and removal of state inmates has been in existence since 1996. Entitled Release to Detainers/Deportation Orders, Arizona law allows for the release of foreign-born inmates upon completion of one-half of the imposed sentence.⁶² They must not have any prior felony or sexually based convictions.⁶³

ICE has saved substantial amounts through these programs because of decreased detention costs. It estimates that it saves \$812,000 per year in detention costs.⁶⁴ Additionally, both New York and Arizona save substantial sums with the reduction of housing inmates for the full duration of their sentence. Between 1995 and 2007, New York State realized a \$140,654,380 savings from decreased detention costs.⁶⁵ Similarly, Arizona Department of Corrections saved \$13,360,534 through the use of its parole for removal program.⁶⁶

In July 2008, ICE announced its first agreement under the Rapid REPAT initiative. Puerto Rico's Department of Correction and ICE entered into a partnership agreement where non-violent offenders will be considered for release from prison for

⁶² Arizona Revised Statutes § 41-1604.14.

⁶³ Ibid.

⁶⁴ ICE Rapid REPAT, Fact Sheet, March 26, 2008
<http://www.ice.gov/pi/news/factsheets/icerapidrepatri.htm> (accessed October 2008).

⁶⁵ Ibid.

⁶⁶ Ibid.

removal purposes.⁶⁷ It is estimated that this agreement will result in \$2.5 million in annual savings.⁶⁸ In August 2008, the Rhode Island Department of Corrections also signed an agreement under the Rapid REPAT program.⁶⁹

Procedurally, new laws may need to be implemented at the state level if laws similar to New York's CPDO are not already in existence. This might be met with significant opposition from victim's rights groups or other groups interested in seeing convicted criminals serve their full time in prison. The incentives to accepting a final order of removal would circumvent the sentence instituted by the trial court. It also circumvents sentencing guidelines. In a sense, it rewards the criminal by giving them a get out of jail free card just because they are an alien. However, significant benefits are derived from this program – a decrease in litigation costs associated with litigating an immigration case, decrease in detention costs by the state involved and ICE, and physical removal of the alien from the United States.

4. Travel Document Procedure Revisited

An additional way to minimize the time an alien spends in ICE's custody is to revamp DRO's preparation of a criminal alien for deportation. DRO does complete fingerprinting, photographing and other requisite documentation while the criminal alien is incarcerated. However, most consulates and embassies require the alien to be in ICE's custody with a final order of removal prior to issuing a travel document. ICE's implementation of the Electronic Travel Document system (eTD) has achieved tremendous success in obtaining travel documents within 24 hours for aliens from Central America. However, this eTD system must be expanded to include other countries. Ways to obtain travel documents prior to the criminal alien coming into ICE's custody must

⁶⁷ U.S. Immigration and Customs Enforcement, News Release, "ICE and Puerto Rico Department of Correction and Rehabilitation Partner to Remove Criminal Aliens and Save Tax Payers Millions of Dollars: First Ever Rapid REPAT Agreement Ensures that Aliens Serving Criminal Sentences are Identified and Processed for Removal Prior to their Release," July 31, 2008, <http://www.ice.gov/pi/nr/0807/080731sanjuan.htm> (accessed August 2008).

⁶⁸ Ibid.

⁶⁹ ICE Rapid REPAT, Fact Sheet, September 30, 2008, <http://www.ice.gov/pi/news/factsheets/icerapidrep.htm?searchstring=rapid%20AND%20repatriation> (accessed December 2008).

also be explored. Additionally, the possibility of obtaining travel documents that do not have expiration dates must be fully examined. Ideally, ICE should even know what flight the criminal alien will be placed on prior to coming into ICE's custody.

The major hurdle for DRO is the interview that is conducted by the consulates of the various countries from which the aliens claim citizenship. Alternative ways to conduct these interviews prior to their release from prison must be explored. Teleconference equipment is available in most state and federal prisons. If, however, it is not available at the local level, a cost/benefit analysis must be done. The cost of purchasing teleconference equipment for County and local officials must be compared with the cost of ICE housing these criminal aliens. On the consulate end, the Department of State would have to reach out through diplomatic channels to see if teleconference interviews are feasible and whether they are a satisfactory way to conduct interviews necessary for the issuance of travel documents.

Not only would teleconference interviews save a large amount of time that the criminal alien spends in ICE custody, it would also save the costs associated with transporting the alien to the consulate for an interview. Security concerns as well as the manpower necessary to accomplish the actual transporting would be eliminated.

There are several downsides that must be considered with this approach. Initially, the actual teleconferencing equipment would have to be in place at the consulates prior to commencing a change in DRO procedure. This will require coordination between ICE, Department of State and a large number of countries and their consulates. The local prison facilities would also have to be willing to make the criminal aliens available for these teleconferences. This will involve coordination between ICE and every prison and jail official. While not impossible hurdles, they are hurdles nonetheless.

5. Implement Alternatives to Detention

DRO has been piloting two programs that are alternatives to physical detention. ISAP has been piloted since June 2004 and involves an alien regularly checking in with

ICE – similar to the parole system employed by the Bureau of Prisons.⁷⁰ The EMD has been piloted since May 2003 and employs the use of an ankle bracelet to monitor an alien’s whereabouts.⁷¹ The Office of Inspector General has criticized DRO for the length of time it has taken to pilot these programs without developing recommendations for their implementation.⁷² These are both valid alternatives to simply releasing aliens into the U.S. population.

While these alternatives to detention would not be available to criminal aliens because of the mandatory detention regulations, they would allow for the release of non-mandatory detention aliens. This would free-up available bed-space so that ICE could house criminal aliens.

The expansion of the CAP to encompass all county and local jails nationwide takes full advantage of the incarceration of criminal aliens. It takes aim at ensuring that criminal aliens are not released back into the U.S. population. The expansion of CAP will necessarily involve bed-space issues. Given the five possible strategies to alleviate the issue of bed-space set forth above, bed-space should not be an impediment to the expansion of CAP under ICE’s Secure Communities.

Currently, between eight and ten percent of the U.S. prison population are foreign-born aliens. The removal of these criminal aliens will reduce crime rates, will reduce the costs associated with prosecuting and detaining these individuals, will decrease underlying funding of terrorism, and decrease the likelihood of potentially radicalized individuals from acting out on radical ideas. Criminal aliens are there for ICE’s taking sitting in jails across the nation. They should not be released back into the U.S. population at the end of their sentence merely because ICE has no relationship with local law enforcement.

⁷⁰ Department of Homeland Security, Office of Inspector General, “Detention and Removal of Illegal Aliens,” OIG-06-33, April 2006, 25.

⁷¹ Ibid.

⁷² Ibid.

E. SIGNIFICANCE OF RESEARCH

This thesis will add to the national discussion of illegal aliens present in the United States and their connection to the war on terror. Currently, most of the debate concerns hardening our borders to prevent further illegal immigrants from entering the country. This national immigration debate also focuses on a possible amnesty for those already present in the United States. The need to address those aliens disobeying the criminal laws of this Nation at every level of the criminal justice system as well as possible solutions to existing issues preventing their swift detention and removal is examined. This thesis points to the need to develop consistent policies regarding identifying criminal aliens designed to foster relationships between ICE and local law enforcement. Policy decisions with the focus upon providing a cohesive homeland security policy to combat the real threat of criminal aliens in the United States are discussed. The outcome of this research demonstrates the need to manage criminal aliens effectively and efficiently to advance homeland security objectives.

F. METHODOLOGY

Interviews focused on the use of removal of criminal aliens as a part of a broader strategic counterterrorism plan. Individuals from the Joint Terrorism Task Force and New York City Police Department's Shield were interviewed concerning whether the effective and efficient removal of criminal aliens is an effective tool in the war on terror.

In researching this thesis of expansion of ICE's CAP and the issues that arise from such expansion, structured formal interviews were conducted of a representative mix of ICE field officials varying in size and physical location in the United States. Specifically, ICE Field Office Directors and Assistant Field Office Directors from DRO who are directly involved with the daily operations of CAP were interviewed. These individuals are located in field offices throughout the country.

From these interviews, this thesis considers whether there is a consensus as to the need for the expansion of the CAP to the local and county levels. It also explores how this can best be accomplished as a collaborative effort with the local law enforcement community. These interviews examine whether there exists an ideal program or

programs already in use that could be implemented nationwide. Identifying the possible problems associated with any expansion of CAP at the local and county level were also be explored during the interview. Once the problems are identified, possible solutions are discussed.

II. ICE’S CRIMINAL ALIEN PROGRAM

A. BACKGROUND

With the enactment in 1996 of the Antiterrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), Congress expressed its clear intent to remove criminal aliens from the United States. These laws severely limit the relief from removal available to criminal aliens. Accordingly, depending upon the seriousness of the crime committed, an alien often has no relief from removal and should be physically removed from the United States.

Congress also enacted mandatory detention requirements for certain criminal aliens whereby aliens convicted of certain crimes cannot be released into the population after completion of their sentence. Rather, they must be detained pending resolution of their immigration status.⁷³ An alien subjected to mandatory detention is entitled to a hearing before the Immigration Court. This Court either resolves the criminal alien’s status in the U.S. allowing them to stay in the country or orders them removed. The process before the Immigration Court, however, is itself often lengthy and may often involve appeals to the Board of Immigration Appeals or litigation before the federal circuit courts.

Mandatory detention alone requires ICE to detain an enormous amount of criminal aliens. However, Congress did not provide the requisite resources to ensure successful implementation of these laws.⁷⁴ In other words, while the laws exist, resources such as bed-space and personnel needs remain a significant impediment to complying with congressional intent. Indeed, a 2006 audit of ICE by the Office of Inspector General found that mandatory detention limited DRO’s ability to detain aliens who pose a potential national security or public safety risk but do not necessarily qualify

⁷³ Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. 1101, et seq. (2000), INA Section 236(c).

⁷⁴ Congress has been generous in recent budget allocations specifically in reference to ICE’s Secure Communities initiative.

as mandatory detainees.⁷⁵ It is estimated that DRO would need almost an additional 35,000 detention beds at an approximate cost of 1.1 billion to detain and remove all aliens from state sponsored terrorism countries (SST) or who originate from special interest countries (SIC) or countries that “promote, produce or protect terrorist organizations and their members” and CAP aliens.⁷⁶ ICE operates eight detention facilities called Service Processing Centers (SPCs) throughout the U.S.⁷⁷ An additional seven facilities are run by government contractors.⁷⁸ A GAO study found that the federal government spent approximately \$5.8 billion to incarcerate criminal aliens from 2001-2004.⁷⁹ Nonetheless, even with all of this money being spent, there still remain bed-space issues that directly impact ICE’s ability to do its job.

ICE is currently unable to remove physically from the U.S. all removable aliens – both criminals and non-criminals.⁸⁰ While ICE apprehends individuals, 36% of those individuals were released due to lack of personnel, bed-space and funding needed to detain them during their pending immigration proceedings.⁸¹ According to an audit conducted by the Office of Inspector General in 2006, ICE “does not have the resources to identify, detain and remove these aliens under its Criminal Alien Program.”⁸² As early as 1996, the Office of Inspector General discussed the shortage of detention bed-space as impacting the legacy Immigration and Naturalization Service’s ability to physically remove aliens with final orders of removal.⁸³ While ICE has made great improvements

⁷⁵ “Detention and Removal of Illegal Aliens,” Department of Homeland Security, Office of Inspector General, OIG-06-33, April 2006, 5.

⁷⁶ Ibid., 2.

⁷⁷ “Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities,” Department of Homeland Security, Office of Inspector General, OIG-07-01, December 2006, 2.

⁷⁸ Ibid.

⁷⁹ Government Accounting Office, “Information on Criminal Aliens Incarcerated in Federal and State Prisons and Local Jails,” Briefing for Congressional Requesters, March 29, 2005, 21.

⁸⁰ “Detention and Removal of Illegal Aliens,” Department of Homeland Security, Office of Inspector General, OIG-06-33, April 2006, 1.

⁸¹ Ibid.

⁸² Ibid., 2.

⁸³ Ibid., 3.

in its ability to remove criminal aliens, much room for improvement still exists - improvements that do not necessarily entail the expenditure of billions of dollars.

B. THE CREATION OF ICE'S CAP

ICE's CAP is a relatively new name for a compilation of several pre-existing programs under one umbrella program. One component of CAP is the former Institutional Removal Program (IRP) which was a "national program that aims to: (1) identify removable criminal aliens in federal, state and local correctional facilities, (2) ensure that they are not released into the community, and (3) remove them from the United States upon completion of their sentences."⁸⁴ The IRP and the Alien Criminal Apprehension Program (ACAP), are all merged into CAP.⁸⁵ ICE's DRO took over the management of CAP in June 2007.⁸⁶

The screening and processing of criminal aliens within the Bureau of Prisons was centralized through the deployment in June 2006 of the Detention Enforcement and Processing Offenders by Remote Technology (DEPORT).⁸⁷ DEPORT screens all federal inmates often through video teleconferencing (VTC) equipment.⁸⁸ Shared databases are also used to track information concerning inmates who are possibly amenable to removal proceedings.⁸⁹

Currently, ICE's CAP does not reach every jail at the local and county level across the United States. It conducts screening at 100% of the state and federal prisons

⁸⁴ "Cooperation of SCAAP Recipients in the Removal of Criminal Aliens from the United States," U.S. Department of Justice, Office of Inspector General, Audit Report 07-07 (redacted – public version), January 2007, 6.

⁸⁵ Ibid, 14.

⁸⁶ ICE Fact Sheet, "Secure Communities," (Washington, D.C., March 2008) http://www.ice.gov/pi/news/factsheets/secure_communities.htm (accessed March 2008).

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

across the United States.⁹⁰ In contrast, ICE only screens about 10% of the 3,100 jails across the nation.⁹¹ Even with limited screening at the local level, ICE identified over 164,000 criminal aliens in fiscal year 2007.⁹²

ICE intends to enhance its CAP over several years through its Secure Communities plan in several ways. In addition to enhancing interoperability of databases at the booking process for all local law enforcement, ICE will reach out to other vested stakeholders. ICE will work with the Executive Office for Immigration Review (EOIR) and local law enforcement facilities to expand the use of teleconferencing capabilities.⁹³ ICE also intends to work with the U.S. Attorney's Office to increase the number of prosecutions of criminal aliens who illegally re-enter the country.⁹⁴ It intends to expand its Alternatives to Detention Program (ATD) and its Rapid REPAT (Removal of Eligible Parolees Accepted for Transfer) program.⁹⁵ To enhance interactions with local law enforcement, it intends to provide 24/7 operational coverage and expand its 287(g) program.⁹⁶

C. NEW YORK'S CAP

In 1990, Congress mandated that deportation proceedings be completed, whenever possible, against aggravated felons prior to their release from criminal detention.⁹⁷ However, even prior to this Congressional mandate, legacy Immigration and Naturalization Service (INS) in cooperation with New York's Department of Correctional

⁹⁰ ICE Fact Sheet, "Secure Communities," (Washington, D.C., March 2008) http://www.ice.gov/pi/news/factsheets/secure_communities.htm (accessed March 2008).

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. 1101, et seq. (2000), INA Section 238(a)

Services (NYDOCS) commenced the Institutional Hearing Program (IHP)⁹⁸ in 1986. The purpose of the program was and is to complete deportation proceedings prior to an inmate's release from NYDOCS' custody.⁹⁹

NYDOCS allows the Executive Office for Immigration Review (EOIR), an agency within the Department of Justice, to have space within its prison facility for a courtroom in which to conduct deportation hearings. However, the nature of this state and federal government endeavor and their working relationship has been less than smooth. Indeed, in 1993, New York State sued in federal District Court to make the federal government commence deportation proceedings against their inmates.¹⁰⁰ The suit centered on INS' failure to take into custody aliens who were on various release programs through New York State. While the suit was eventually dismissed by the District Court for lack of jurisdiction, it does highlight what can happen with a breakdown in communication even when both sides are working toward a common goal.

In 1994, after the dismissal of the lawsuit, NYDOCS and the Justice Department arranged to streamline the intake process for the IHP through three distinct prisons – one a maximum-security prison, one a medium security prison and one a female maximum-security prison.¹⁰¹ All inmates would come through one of these three facilities upon their initial entry into the prison system. After that streamlining process commenced, INS agents were stationed at or regularly visited these prisons to interview inmates flagged by state officials as foreign-born during their prison intake screening. Every foreign-born inmate who entered NYDOCS from then on would be interviewed by an INS agent.¹⁰²

The list of foreign-born inmates generated by NYDOCS is then given to ICE. ICE then runs these inmates through a variety of databases to see if an immigration

⁹⁸ The name of the IHP changed to IRP in 1996.

⁹⁹ DOCS Today, Autumn 1995, 18.

¹⁰⁰ *Cuomo v. Barr*, 7 F.3d 17 (2d Cir. 1993).

¹⁰¹ Stanley Mailman, "Early Parole for Deportation and the Right to a Lawyer," New York Law Journal, October 23, 1996.

¹⁰² This still did not address the problem of aliens who were already in prison at the commencement of this streamlined process.

record already exists for a particular inmate. The ICE officers then provide NYDOCS with a list of inmates that need to be interviewed. During the interview process, alienage and citizenship are determined. In other words, an inmate confirms their place of birth and the fact that they are not U.S. citizens; they also confirm whether they are present in the U.S. legally or illegally. Place and manner of entry into the United States is also queried. They are asked to sign an affidavit summarizing the interview, which can later be used as evidence in Immigration Court.

To establish removability based upon their criminal conviction, ICE receives the inmate's criminal records through official NYDOCS records. These certified records can then be used as evidence in Immigration Court. This cooperation with NYDOCS saves ICE significant resources in not having to retrieve certified records of the conviction from the criminal court.

A detainer is given to the prison and follows the inmate to any prison facility to which the inmate is transferred. This detainer is placed in the inmate's records and advises the prison of ICE's interest in taking the inmate into custody. Prison officials are not to release the inmate without informing ICE.

Once alienage and removability have been established, a "Notice to Appear" is served upon the criminal alien and the Immigration Court setting forth the reasons the government believes the alien should be removed from the United States. The alien is either physically brought to the Immigration Court or appears via teleconferencing. NYDOCS' use of this televideo equipment saves thousands of dollars in transport costs. It also eliminates the security hazards associated with transporting a criminal.

The alien is given their rights in Immigration Court and given an opportunity to obtain counsel. They are advised of any relief from removal for which they may be eligible to apply. Often, no relief is available to them due to the serious nature of the crime for which they are incarcerated. At the conclusion of their immigration hearing, they are either granted some sort of relief from removal and allowed to remain in the United States or they are given an Order of Removal. If they are allowed to remain, the immigration detainer is lifted as ICE can no longer remove them from the United States.

They will be released at the end of their prison sentence. If, however, their case is still pending or they have been ordered removed, NYDOCS notifies ICE approximately thirty days prior to the inmate's release. He is then transferred from the custody of NYDOCS to the custody of ICE.

Once an individual is transferred to ICE custody, ICE next determines a location that is appropriate for the inmate. If the immigration hearing remains unresolved, the inmate is transferred to an ICE detention facility with an immigration court. In New York, if the inmate has a final order of removal, he is transferred to one designated ICE detention facility in upstate New York to be processed for removal. This involves getting the appropriate paperwork and travel documents from the inmate's home country to effect actual removal. Depending upon the specific country and the particular ICE field office involved, this can range from a couple of days to two weeks or be as long as 90 days. Where an alien has a final order of removal and the appropriate travel documents, a flight is arranged and the alien is physically removed from the United States.

Some countries, however, do not comply with the issuance of travel documents.¹⁰³ There are also other countries to which the United States cannot deport even its worst criminal aliens; Cuba is at the top of this list. If ICE cannot obtain travel documents or cannot effect the removal of the criminal alien within a "reasonable" amount of time, this alien must be released from ICE custody after approximately 180 days.¹⁰⁴

If the alien does not have a final order of removal, they are transferred to an ICE detention facility that has the requisite bed space. They will be detained at this facility until resolution of their immigration case. While immigration hearings and appeals are expedited for those who are detained, an alien still may spend weeks or months in ICE's custody.

¹⁰³ These include China, Eritrea, Ethiopia, India, Iran, Jamaica, Laos, and Vietnam. "Detention and Removal of Illegal Aliens," Department of Homeland Security, Office of Inspector General, OIG-06-33, April 2006, 17, n. 37.

¹⁰⁴ *Zavydas v. Davis*, 533 U.S. 533 (2001) and *Clark v. Martinez*, 543 U.S. 371 (2005) (mandating the release of criminal and other high risk aliens after 180 days if the alien's removal is not likely to occur in the reasonably foreseeable future).

D. SECURE COMMUNITIES

In March 2008, ICE announced the launching of its Secure Communities initiative.¹⁰⁵ Secure Communities seeks to expand ICE's criminal alien program to all of the jails and prisons throughout the United States.¹⁰⁶ It seeks to identify, detain and remove all of the aliens encountered by law enforcement.¹⁰⁷ While the strategic plan for this initiative is still being developed, the core concepts remain.

Recognizing the existence of significant gaps in ICE's current CAP, Secure Communities seeks to bring together vested stakeholders through outreach and technology integration. It adopts a risk based approach to identifying and processing criminal aliens setting forth three levels of criminal offenders – level 1 being the most serious felonies.¹⁰⁸ ICE is exploring technology solutions to integrate booking data so that ICE can prioritize its resources to the most serious offenders.¹⁰⁹

¹⁰⁵ U.S. Immigration and Customs Enforcement, News Release, "ICE Unveils Sweeping New Plan to Target Criminal Aliens in Jails Nationwide," (Washington, D.C., March 28, 2008), <http://www.ice.gov/pi/news/newsreleases/articles/080328washington.htm> (accessed March 2008).

¹⁰⁶ Ibid.

¹⁰⁷ ICE Fact Sheet, "Secure Communities," (Washington, D.C., March 2008), http://www.ice.gov/pi/news/factsheets/secure_communities.htm (accessed March 2008).

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

III. PRISONER RADICALIZATION

Two key processes pave the way towards actual terrorism: radicalization and recruitment. Radicalisation is a social process, while recruitment is a form of ‘direction’ that taps into radicalization and seeks to channel it in the direction of violence.¹¹⁰

In its war on terror, the United States faces threats from those both inside and outside of its borders. While improvements have been made to harden our borders, a significant threat exists from what already lies within our imprisoned population. Prisoner radicalization is a serious threat that contains the greatest potential for the creation of a “homegrown terrorist.” Prisons provide an ideal environment for both recruitment and radicalization of a potential terrorist.

A. THE INDIVIDUAL

Much has been written about the conditions or situations that can make an individual become a terrorist. Likewise, much has been written about the characteristics of the individual that make them susceptible to radical terrorist ideas. If one could identify situational conditions that are conducive to the creation of a terrorist as well as recognize individuals with the enumerated traits, then we are better able to identify and monitor those conditions. However, much of the literature about terrorists derives its information from secondary sources rather than directly from the terrorist themselves.¹¹¹

Without talking directly to terrorists, past behaviors of individuals who are known terrorists can be examined. Those seeking to recruit individuals into a terrorist organization seek out specific types of individuals. When seeking out these individuals, “part of the challenge facing those who seek to instigate rebellion and revolution is to fire the imagination of the disadvantaged, so that they find it easier to believe that under fairer

¹¹⁰ National Coordinator for Terrorism, “What is Terrorism?” Netherlands Ministry of the Interior and Kingdom Relations, Netherlands Ministry of Justice, http://english.nctb.nl/what_is_terrorism/introduction (accessed October 2008).

¹¹¹ David W. Brannan, Philip F. Esler, and N.T. Anders Strindberg, “Talking to ‘Terrorists’: Towards an Independent Analytical Framework for the Study of Violent Substate Activism,” *Studies in Conflict & Terrorism*, University of Saint Andrews, 24 (2001): 7.

conditions their collective lives would have been much better.”¹¹² U.S. prisons are filled with those who believe themselves disadvantaged and subject to unfair conditions. Prisoners themselves are vulnerable to extremist views because of the nature of their situation. Those that feel discriminated against or who feel oppressed as a minority are ripe for recruitment.¹¹³

Imprisonment itself “may increase a prisoner’s susceptibility to adopting radicalized ideas or beliefs.”¹¹⁴ Importance has been placed upon how an individual subjectively feels about their particular situation relative to others.¹¹⁵ How an individual is treated and valued relative to others impacts these subjective beliefs.¹¹⁶

Social identity theory recognizes the individual’s need and desire to belong to a group to help define their distinct identity.¹¹⁷ The self concept of individuals stems in large part from ones membership in certain groups.¹¹⁸ Where an individual is satisfied with their social identity, they will strive to preserve the status quo.¹¹⁹ Where an

¹¹² Fathali M. Moghaddam, *Multiculturalism and Intergroup Relations: Psychological Implications for Democracy in Global Context* (Washington, D.C.: American Psychological Association, 2008), 118.

¹¹³ Donald VanDuyn, “Prison Radicalization: The Environment, the Threat, and the Response,” Statement to the Senate Committee on Homeland Security and Governmental Affairs, September 19, 2006, 2.

¹¹⁴ Greg Hannah, Lindsay Clutterbuck, and Jennifer Rubin, “Radicalization or Rehabilitation: Understanding the Challenge of Extremist and Radicalized Prisoners,” *RAND Europe* 2008, x.

¹¹⁵ Fathali M. Moghaddam, *From the Terrorists’ Point of View: What They Experience and Why They Come to Destroy* (Praeger Security International, Westport, Connecticut 2006) 46.

¹¹⁶ Ibid.

¹¹⁷ Fathali M. Moghaddam, *Multiculturalism and Intergroup Relations: Psychological Implications for Democracy in Global Context*, (Washington, D.C.: American Psychological Association, 2008), 95, (citing H. Taifel and J.C. Turner, (1979); An Integrative Theory of Intergroup Conflict, in *The Social Psychology of Intergroup Relations* ed. W. G. Austin and S. Worchel (Monterey, CA: Brooks/Cole, 1986), 33-47; H. Taifel and J.C. Turner; “The Social Identity Theory Of Intergroup Behavior,” in *Psychology of Intergroup Relations* ed. S. Worchel and W. G. Austin (Chicago: Nelson-Hall), 7-24.

¹¹⁸ Rupert Brown, *Group Processes: Dynamics within and between Groups* (Oxford: Basil Blackwell, 1988), 20-22.

¹¹⁹ Fathali M. Moghaddam, *Multiculturalism and Intergroup Relations: Psychological Implications for Democracy in Global Context*, (Washington, D.C.: American Psychological Association, 2008), 97.

individual sees their social identity as a member of a disadvantaged group, they often compare themselves to those they consider more privileged relative to their deprived state and make demands for better treatment.¹²⁰

“Social identity” has been defined to mean an individual’s self-concept deriving from their knowledge of membership in a social group in conjunction with one’s imposed significance of that membership.¹²¹ Stereotypes relate directly to social identity theory. Stereotypes are “beliefs that all members of a particular group have the same qualities, which circumscribe the group and differentiate it from other groups.”¹²² These social psychology theories are instrumental when examining an individual who finds themselves within a prison environment.

B. THE PRISON ENVIRONMENT

The prison environment isolates the individual from society at large but in so doing creates its own society - a society with strict rules and regulations where freedoms are severely restricted and almost non-existent. Hostility toward prison authorities is often bred from this restrictive and arbitrary environment.¹²³ The inmates are often cut off from family and friends due to the physical location of their housing facility within a state’s prison system. Practically speaking, not everyone can be incarcerated near their hometown but instead are transferred to a facility, which is often hours from their home in a place that provides no public transportation for relatives desiring to visit. This loss of the family and friend support systems can cause psychological stress and a feeling of isolation.¹²⁴

¹²⁰ Fathali M. Moghaddam, *Multiculturalism and Intergroup Relations: Psychological Implications for Democracy in Global Context*, (Washington, D.C.: American Psychological Association, 2008), 97.

¹²¹ Henri Tajfel, *Differentiation between Social Groups: Studies in the Social Psychology of Intergroup Relations* (London et al.: Academic Press), 28.

¹²² Michael A. Hogg and Dominic Abrams, *Social Identifications: A Social Psychology of Intergroup Relations and Group Processes* (London and New York: Routledge, 1988), 67.

¹²³ G. Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton University Press, Princeton, PA, 1999), 20.

¹²⁴ Greg Hannah, Lindsay Clutterbuck, and Jennifer Rubin, “Radicalization or Rehabilitation: Understanding the Challenge of Extremist and Radicalized Prisoners,” *RAND Europe 2008*, 6.

The prison system itself strips the individual of what society uses to define the individual. Personal possessions and individualized clothing are replaced with a uniform and a barren cell devoid of any identifying traits other than its own number. All forms of privacy are eliminated in the name of security such that showers and toilets are subject to public scrutiny. The prisoners are assigned numbers that are used to identify them rather than their given names. These numbers will follow them no matter where they are transferred in a state's prison system. That number becomes their new identity.

The process of conditioning to prison life is dehumanizing and designed such that the prisoners surrender control of every aspect of the lives.¹²⁵ In so doing, it often exacerbates an inmate's existing anti-social tendencies.¹²⁶ Prisoners often join or form groups to establish a sense of identity – whether it be religious based groups, race based groups or gang related groups.¹²⁷ Assimilating into their new environment and culture has been described as “prisonization.”¹²⁸ The inmate adopts the customs and behavior found within the prison community.¹²⁹ In a 2008 RAND report, it was found that:

Prisoners' differential ability to cope and integrate in to the prison community is influenced by a range of individual, group and institutional variables, including their physical and mental health, their substance dependency, their personal relationships, their group memberships and affiliations, their attitudes, norms and believe systems, their ability to form new relationships and affiliations, and the composition of groups and regimes already found in prison.¹³⁰

¹²⁵ N. Viggiani, “Unhealthy Prisons: Exploring Structural Determinants of Prison Health,” *Sociology of Health and Illness* 29, no. 1 (2007): 115-35.

¹²⁶ Greg Hannah, Lindsay Clutterbuck, and Jennifer Rubin, “Radicalization or Rehabilitation: Understanding the Challenge of Extremist and Radicalized Prisoners,” (RAND Europe, 2008), 7.

¹²⁷ *Ibid.*, 13.

¹²⁸ *Ibid.*, 9.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

Indeed, an otherwise normal individual can be dramatically influenced by the environment found in prison. Psychological studies from the 1960s demonstrate that it is not necessarily a “bad apple” that will determine future behavior so much as it is a “bad barrel.”¹³¹

C. PRISON RADICALIZATION

Radicalization has been described as “a search for identity in a moment of crisis.”¹³² The process of radicalization involves a “cognitive opening, a moment when previous explanations and belief systems are found to be inadequate in explaining an individual’s experience.”¹³³ In the prison context, radicalization “refers to the process by which inmates . . . adopt extreme views, including beliefs that violent measures need to be taken for political or religious purposes.”¹³⁴

The process of radicalization can be compared to “similarity attraction.” Individuals are attracted to organizations that are similar to themselves. The organization also has the ability to make choices depending upon the attractiveness of the individual. Once the individual is part of the organization, they become socialized and even more assimilated to the norms within the organization.¹³⁵

Applied in a prison environment, the “similarity attraction” results in vulnerable prisoners being lured by the attractiveness of radical ideals. These radical ideals reach prisoners through a variety of means but primarily through anti-U.S. information disseminated by religious providers, other radicalized inmates or extremist literature.¹³⁶

¹³¹ Philip G. Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (Rider, London, 2007).

¹³² T. Choudury, *The Role of Muslim Identity in Radicalization*, (a study in progress) (London: Department for Communities and Local Government, April 2007), www.communities.gov.uk/publications/communities/muslimidentitypolitics (accessed September 2008).

¹³³ Ibid.

¹³⁴ United States Department of Justice, Office of the Inspector General, “A Review of the Federal Bureau of Prisons’ Selection of Muslim Service Providers,” April 2004, 6.

¹³⁵ Fathali M. Moghaddam, *Multiculturalism and Intergroup Relations: Psychological Implications for Democracy in Global Context* (Washington, D.C.: American Psychological Association, 2008), 136.

¹³⁶ Donald VanDuyn, “Prison Radicalization: The Environment, the Threat, and the Response,” Statement to the Senate Committee on Homeland Security and Governmental Affairs, September 19, 2006, 2.

The prisoner who is vulnerable to these radical ideals espoused by charismatic leaders is one who has suffered perceived injustices of society and seeks an outlet for the anger he feels toward society.¹³⁷

The prison environment provides the perfect environment for radicalization. Individuals who are thrown into a new environment behind bars often feel rejected by society and struggle to identify themselves. This identity struggle leads to a seeking out of new ideals and beliefs. A new identity is often formed with the joining and assimilating into a group.¹³⁸ It is the type of group that is formed while in prison that is of greatest concern. The fact remains however that the prison environment is ideal for the creation of radicalized individuals and deserves close scrutiny by law enforcement and intelligence officials.

By no means does every prisoner go on to become a terrorist. Indeed, there are those who constructively use the prison environment. Religion itself can be a motivating factor for positive change. Individuals who convert to Islam or any other religion often lead a disciplined and law abiding life outside of prison. It is the radical form of any religion to which some prisoners can become susceptible in the prison environment.

D. HISTORICAL PERSPECTIVE OF RADICALIZED PRISONERS

History is filled with examples of prisoners who became radicalized while in prison. The prison environment that exists throughout the world has been fertile grounds for the furtherance of radical ideas – an incubator for extremism.¹³⁹ Likewise, it has also provided the opportunity for like-minded individuals to connect with one another and further their cause. Since ideology is the lifeblood of a terrorist movement, a new cell has the potential to arise behind prison walls.¹⁴⁰

¹³⁷ Fathali M. Moghaddam, *From the Terrorists' Point of View: What They Experience and Why They Come to Destroy* (Praeger Security International, Westport, Connecticut, 2006), 86-88.

¹³⁸ Greg Hannah, Lindsay Clutterbuck, and Jennifer Rubin, "Radicalization or Rehabilitation: Understanding the Challenge of Extremist and Radicalized Prisoners," *RAND Europe*, 2008, 14.

¹³⁹ Frank J. Cilluffo, Sharon L. Cardash and Andrew Whitehead, "Radicalization: Behind Bars and Beyond Borders," *The Brown Journal of World Affairs* 13, no. 2 (2007): 114.

¹⁴⁰ *Ibid.*

A 2008 RAND study explored a variety of groups and their use of the prison environment to further their respective cause.¹⁴¹ From the IRA to the Suffragettes to the Aryan Nation, imprisonment has been used as an opportunity to recruit members and network with like-minded others within this captive environment. This phenomenon is pervasive in prisons throughout the world.

Some more recent examples of prison radicalization include the case of Jeff Fort and his involvement with El Rukn. Fort converted to Islam and instructed his followers while incarcerated in the brokering of a deal with the Libyan government in 1985 to carry out attacks on U.S. police and military targets in exchange for 2.5 million dollars.¹⁴² In 1987, Fort and six others were convicted and sentenced to 80 years incarceration.¹⁴³

While incarcerated, James Ellison, founder of the Covenant Sword and Arm of the Lord (CSA) met Robert G. Miller who went on to become Ellison's spiritual advisor in prison.¹⁴⁴ After their release from prison, this extremist Christian group recruited others to join their compound where they made landmines and stored a large supply of cyanide intended to be used to poison a city's water supply.¹⁴⁵ In 1985, Ellison was convicted of federal racketeering and weapons charges and sentenced to 20 years incarceration.¹⁴⁶

Another example of radical leaders thriving in prison is the case of Sheik Omar Abdel Rahman, the blind cleric and emir of Egypt's Gama'at al Islamia who was

¹⁴¹ Greg Hannah, Lindsay Clutterbuck, and Jennifer Rubin, "Radicalization or Rehabilitation: Understanding the Challenge of Extremist and Radicalized Prisoners," *RAND Europe*, 2008.

¹⁴² United States Department of Justice, National Drug Intelligence Center, "Drugs and Crime Gang Profile: Black Peace Stone Nation, August 2003, 2.

¹⁴³ Ibid.

¹⁴⁴ Frank Cilluffo, Gregory Saathoff, Jane Lane, Sharon Cardash, Josh Magarik, Andrew Whitehead, Jeffrey Raynor, Arnold Bogis, and Gina Lohr, "Out of the Shadows: Getting Ahead of Prisoner Radicalization," *A Special Report by the Homeland Security Policy Institute at The George Washington University and the Critical Incident Analysis Group at the University of Virginia* (Washington, D.C.: The George Washington University, September 2006), 2, http://www.heathsystem.virginia.edu/internet/ciag/publications/out_of_the_shadows.pdf (accessed September 2008).

¹⁴⁵ Ibid.

¹⁴⁶ Anti-Defamation League, "Elohim City: Extremism in America," http://www.adl.org/Learn/ext_us/Elohim.asp?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=3&item=ec (accessed September 2008).

incarcerated for his role as mastermind of the 1993 plot to blow up New York City landmarks. The blind sheik issued a decree from prison stating that “Muslims everywhere [should] dismember their nation, tear them apart, ruin their economy, provoke their corporations, destroy their embassies, attack their interests, sink their ships, . . . shoot down their planes, [and] kill them on land, at sea, and in the air. Kill them wherever you find them.”¹⁴⁷

There have been numerous instances of radicalized prisoners since September 11, 2001. The infamous shoe bomber, Richard Reid, was radicalized while incarcerated for petty crime in the United Kingdom’s Feltham Young Offenders Institution.¹⁴⁸ Reid’s radicalization was further developed upon his release from prison with sermons by radical clerics such as Abu Hamza al-Masri at the same mosque attended by Zacarias Moussaoui, convicted 9/11 terrorist.¹⁴⁹ He was convicted in 2003 of one count of attempted use of a weapon of mass destruction against United States nationals outside the United States and two counts of interference with a flight crew by use of a dangerous weapon and sentenced to life in prison.¹⁵⁰

Similarly, the leader of the attempted bombing of London’s subway and bus system in July 2005, Muktar Said Ibrahim, was incarcerated for five years at the same prison as Richard Reid, Feltham Young Offenders Institution, after a conviction for a gang related offense.¹⁵¹ Ibrahim converted to Islam while incarcerated and went on to

¹⁴⁷ Frank Cilluffo, Gregory Saathoff, Jane Lane, Sharon Cardash, Josh Magarik, Andrew Whitehead, Jeffrey Raynor, Arnold Bogis, and Gina Lohr, “Out of the Shadows: Getting Ahead of Prisoner Radicalization,” *A Special Report by the Homeland Security Policy Institute at The George Washington University and the Critical Incident Analysis Group at the University of Virginia* (Washington, D.C.: The George Washington University, September 2006), 2, http://www.heathsystem.virginia.edu/internet/ciag/publications/out_of_the_shadows.pdf (accessed September 2008).

¹⁴⁸ Raffaello Pantucci, “Britain’s Prison Dilemma: Issues and Concerns in Islamic Radicalization,” *Terrorism Monitor*, The Jamestown Foundation, 6, no. 6 (March 24, 2008).

¹⁴⁹ Michael Elliot, “The Shoe Bomber’s World,” *Time*, February 25, 2002, 47-50.

¹⁵⁰ “Exchange between Reid, Judge Follows Life Sentence,” *CNN.com*, December 6, 2003, <http://www.cnn.com/2003/LAW/01/30/shoebomber.sentencing/> (accessed September 2008).

¹⁵¹ “Profile: Muktar Ibrahim,” *BBC News*, July 11, 2007, http://news.bbc.co.uk/2/hi/email_news/6634901.stm (accessed September 2008).

become radicalized at the same mosque as Reid and Moussaoui.¹⁵² He was convicted in July 2007 of conspiracy to murder for his role in the London attacks, sentenced to life in prison and is currently appealing his conviction.¹⁵³ Ibrahim was born and raised in Eritrea and eventually immigrated to the United Kingdom.¹⁵⁴ He later gained UK citizenship.¹⁵⁵ Ibrahim's convictions for robbery which occurred prior to his gaining citizenship in the UK rendered him a criminal alien in the United Kingdom. It remains unclear if these early criminal convictions would have made him removable under the laws of the United Kingdom or whether these convictions were brought to the attention of the immigration authorities prior to his gaining citizenship and prior to his involvement in the London subway attacks.

Yet another example of prison radicalization lies in the formation of and recruitment of members to the terrorist organization Jam'iyyat Ul-Islam Is-Sheeh (JIS) by founder Kevin James while incarcerated in California state prison. While imprisoned, James formed JIS and recruited Levar Haley Washington to join his cause.¹⁵⁶ Together they plotted to attack U.S. military operations and Jewish facilities in the Los Angeles area.¹⁵⁷ The two pled guilty in 2007 to conspiring to wage war against the United States.¹⁵⁸

¹⁵² Sarah Lyall, "In Britain, Migrants Took a New Path: To Terrorism," *The New York Times*, July 28, 2005, A10.

¹⁵³ "July 21 London Bombers Appeal Against Convictions," *The Birmingham Post*, March 5, 2008, <http://www.birminghampost.net/news/2008/03/05/july-21-london-bombers-appeal-against-convictions-65233-20564894/> (accessed September 2008).

¹⁵⁴ "Profile: Muktar Ibrahim," *BBC News*, July 11, 2007, http://news.bbc.co.uk/2/hi/email_news/6634901.stm (accessed September 2008).

¹⁵⁵ Ibid.

¹⁵⁶ United States Department of Justice, "Two Plead Guilty to Domestic Terrorism Charges of Conspiring to Attack Military Facilities, Jewish Targets," *Press Release* (Washington, D.C.: December 14, 2007), http://www.usdoj.gov/opa/pr/2007/December/07_nsd_1006.html (accessed September 2008).

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

Al Qaeda continues to seek to have its message reach those currently imprisoned. Indeed, extremist translations of the Qur'an have been distributed to prisoners.¹⁵⁹ Radical Islamic views are being preached at a majority of prisons in France.¹⁶⁰ Abu Muhammad al-Maqdisi, an imprisoned Al Qaeda leader, continues his recruitment of other imprisoned individuals through his writings. In one article, al-Maqdisi calls on those imprisoned to use imprisonment as an opportunity for "obeying God, worshipping him, memorizing the Quran, seeking and spreading Da'wah and learning from the experience of those around him to become stronger for jihad."¹⁶¹

E. EXPANSION OF CAP AND RADICALIZED PRISONERS

At least one extremist group is known to have maintained a database with information regarding prisoners they deemed potential recruits.¹⁶² Prisoner names, release dates and addresses to be used upon release were maintained by al Haramain for over 15,000 prisoners.¹⁶³

With ICE's Secure Communities initiative, criminal aliens who have potentially been exposed to radical ideas will no longer pose a threat to the community upon their release from prison. These individuals will be detained by ICE and eventually deported to their native country. The threat of radicalized prisoners who are criminal aliens has effectively been neutralized.

¹⁵⁹ Frank Cilluffo, Gregory Saathoff, Jane Lane, Sharon Cardash, Josh Magarik, Andrew Whitehead, Jeffrey Raynor, Arnold Bogis, and Gina Lohr, "Out of the Shadows: Getting Ahead of Prisoner Radicalization," *A Special Report by the Homeland Security Policy Institute at The George Washington University and the Critical Incident Analysis Group at the University of Virginia* (Washington, D.C.: The George Washington University, September 2006), 2, http://www.heathsystem.virginia.edu/internet/ciag/publications/out_of_the_shadows.pdf (accessed September 2008).

¹⁶⁰ Pascale Combelles Siegel, "Radical Islam and the French Muslim Population," *Terrorism Monitor* 4, no. 15 (July 27, 2006).

¹⁶¹ Greg Hannah, Lindsay Clutterbuck, Jennifer Rubin, "Radicalization or Rehabilitation: Understanding the Challenge of Extremist and Radicalized Prisoners," *RAND Europe*, 2008, 29.

¹⁶² Daveed Gartenstein-Ross, "Prison Radicalization: Are Terrorist Cells Forming in U.S. Cell Blocks?" (Testimony, Senate Homeland Security and Governmental Affairs Committee, September 19, 2006).

¹⁶³ Ibid.

IV. FINANCING OF TERRORISM

While terrorists obtain funding from a variety of sources, criminal activity significantly contributes to a terrorist group's financial abilities. Accordingly, identifying, detaining, and removing criminal aliens from the United States may significantly impact terrorists' ability to obtain financing while increasing law enforcement's effectiveness in the war on terror.

A simple fact in the war on terror is that terrorists need money to carry out their objectives. It is needed to maintain the broad infrastructure of their organization to plan and execute future attacks.¹⁶⁴ Money has been described as central to counterterrorism strategies.¹⁶⁵ Law enforcement's ability to disrupt the flow of financing to terrorist organizations is integral to disrupting the effectiveness of terrorist organizations.¹⁶⁶ The disruption of terrorist financing can be a useful intelligence tool and can lead to the uncovering of previously unknown links between terrorist operatives.¹⁶⁷ Indeed, law enforcement's investigation of terrorist financing has disrupted at least four terrorist attacks.¹⁶⁸ Efforts continue around the globe to combat terrorism financing.¹⁶⁹

The financing of terrorism has a variety of sources including legitimate sources such as donations from charitable organizations to state sponsored terrorism to criminal enterprise. The use of criminal activity to fund terrorist activities varies from low level

¹⁶⁴ Matthew Levitt and Michael Jacobson, "The Money Trail: Finding, Following and Freezing Terrorist Finances," Washington Institute for Near East Policy, Washington, D.C., November 2008, 1.

¹⁶⁵ Paul R. Pillar, *Terrorism and U.S. Foreign Policy*, (Brookings Institution Press, Washington, D.C. 2001), 92.

¹⁶⁶ Dennis M. Lormel, "Combating Terrorist Financing at the Agency and Interagency Levels," *CTC Centinel* 1, no. 4 (March 2008).

¹⁶⁷ Matthew Levitt and Michael Jacobson, "The Money Trail: Finding, Following and Freezing Terrorist Finances," *Washington Institute for Near East Policy* (Washington, D.C., November 2008), 2.

¹⁶⁸ House Committee on Financial Services Subcommittee on Oversight and Investigations, *Testimony of John S. Pistole, Assistant Director, Counterterrorism Division, FBI: "The Terrorist Financing Operations Section,"* 108th Cong., 2nd sess., September 24, 2003.

¹⁶⁹ United States Government Accountability Office, "Terrorist Financing: Better Strategic Planning Needed to Coordinate U.S. Efforts to Deliver Counter-Terrorism Financing Training and Technical Assistance Abroad," GAO-06-19, October 2005, Appendix 1.

fraud to organized crime.¹⁷⁰ Arms, drug and human trafficking have all been linked to terrorism.¹⁷¹ Additionally, criminal activities involving counterfeit goods and contraband cigarettes have also supported terrorist group activities.¹⁷² Illegal cigarette smuggling alone has been linked to terrorist organizations such as Hezbollah, Hamas and al Qaeda.¹⁷³ In 2006, the Department of Justice indicted 19 men on charges of participating in black market cigarette sales linked to the funding of Hezbollah.¹⁷⁴ The “Lackawanna Seven” received funding from an individual who was convicted of conspiracy commit money laundering and contraband cigarette smuggling.¹⁷⁵

Intellectual property crimes have also been a source of significant funding for terrorists. The trafficking and sale of counterfeit goods, whether it is a fake designer purse or a copied CD or DVD, is an emerging threat.¹⁷⁶ There is low risk associated with this type of crime with a high return on investment.¹⁷⁷

In addition, drug trafficking continues to be an incredibly lucrative source of funding for terrorist organizations. In testimony before the Senate Judiciary Committee in May 2003, Mr. Steven McGraw, the Assistant Director of the Federal Bureau of Investigation’s (FBI) Office of Intelligence stated that “international drug trafficking is a highly lucrative enterprise generating billions of dollars in profit that terror groups can

¹⁷⁰ Financial Action Task Force, *Terrorist Financing* (FATF/OECD: Paris France, February 29, 2008), 15.

¹⁷¹ House Committee on International Relations, Subcommittee on International Terrorism, Nonproliferation, and Human Rights, *Testimony of Louise Shelley: “Human Trafficking: Transnational Crime and Links with Terrorism,”* 108th Cong., 2nd sess., June 25, 2003.

¹⁷² United States Government Accountability Office, “Terrorist Financing: Better Strategic Planning Needed to Coordinate U.S. Efforts to Deliver Counter-Terrorism Financing Training and Technical Assistance Abroad,” GAO-06-19, October 2005, 5.

¹⁷³ “Tobacco and Terror: How Cigarette Smuggling is Funding Our Enemies Abroad,” Staff Report, U.S. House Committee on Homeland Security, 1.

¹⁷⁴ Jay Solomon, “U.S. Targets Hezbollah Funds: Counter-Terror Efforts are Heightened on Iran-Linked Group,” *Wall Street Journal*, April 24, 2006.

¹⁷⁵ “Tobacco and Terror: How Cigarette Smuggling is Funding Our Enemies Abroad,” Staff Report, U.S. House Committee on Homeland Security, 6.

¹⁷⁶ Ronald K. Noble, “The Links Between Intellectual Property Crime and Terrorist Financing,” Testimony of the Interpol Secretary General before the U.S. House of Representatives, Committee on International Relations, 108th Congress, First Session, July 16, 2003.

¹⁷⁷ *Ibid.*

easily tap into, and that most if not all terror groups obtain financing from drug trafficking.”¹⁷⁸ In 2006-07, the Department of State’s International Control Strategy Report (INCSR) reported that in the tri-border region of Paraguay, Argentina and Brazil alone, tens of millions of dollars are laundered and support terrorism in the region.¹⁷⁹ Of greatest significance, nearly one third of the organizations on the Justice Department’s list of major trafficking groups responsible for the U.S. drug supply also appear on the State Department’s list of Foreign Terrorist Organizations in 2002.¹⁸⁰ There remains a concern about the nexus between trafficking of narcotics and terrorism and the possible use of drug smuggling paths for smuggling weapons of mass destruction into the United States.¹⁸¹

A. HISTORICAL PERSPECTIVE ON FINANCING OF TERRORIST ORGANIZATIONS

Terrorist organizations throughout history have at least one thing in common - the need for funds to keep their organization running. Almost all terrorist organizations have links to criminal activities. While the topic of terrorist financing is too broad to be fully discussed in this thesis, below are just a few examples of terrorist organizations and the link between criminal endeavors and the financing of their activities.

In the 1970s, the IRA funded its operations through a variety of criminal activities, which included robberies, kidnappings, extortion and illegal drinking clubs.¹⁸²

¹⁷⁸ “NARCO-Terrorism: International Drug Trafficking and Terrorism--A Dangerous Mix,” Hearing before the Committee on the Judiciary, United States Senate, One Hundred Eighth Congress, First Session, May 20, 2003.

¹⁷⁹ U.S. Department of State, International Narcotics Control Strategy Report, 2006-07.

¹⁸⁰ Linda D. Kozaryn, “Ashcroft says Terrorism-Drug Trafficking Link ‘Shocking,’” U.S. Department of Defense (Washington: American Forces Press Service, July 31, 2002), <http://www.defenselink.mil/news/newsarticle.aspx?id=43601> (accessed September 2008).

¹⁸¹ Charles Allen, “Narco-Trafficking: What is the Nexus with the War on Terror?” Remarks by the Under Secretary at the AFCEA-SOUTHCOM “South 2008” Conference Panel, (Miami, Florida, October 2008).

¹⁸² Michael Jonsson and Svante Cornell, “Countering Terrorist Financing: Lessons Learned From Europe,” *Georgetown Journal of International Affairs* (Winter/Spring 2007), 70.

In the 1980s, the IRA changed its method of financing by abandoning activities deemed too risky for the financial return and too costly when considering public displeasure.¹⁸³

Likewise, Spain's Euskadi Ta Askatasuna (ETA) also turned to criminal enterprise to fund its activities. In addition to a revolutionary tax that was imposed in the Basque region,¹⁸⁴ ETA relied upon robberies and kidnappings to fund their operations.¹⁸⁵ Following the IRA's example, ETA also stopped criminal activities that were too violent or deemed too risky for the financial gain.¹⁸⁶

Two major Colombian terrorist groups derive their funding from trafficking in cocaine. Both the Revolutionary Armed Forces of Colombia (FARC) and the United Self-Defense Groups of Colombia (AUC) receive more than half of their funding through cocaine production, taxation and trafficking.¹⁸⁷ Formed in 1965, the FARC currently raises \$200 - 300 million annually through the illegal drug trade.¹⁸⁸ The FARC also raises funds through kidnapping and extortion schemes.¹⁸⁹

The French authorities discovered in 1996 that a series of armed robberies were perpetrated by the Roubaix gang, a small Islamic militant group.¹⁹⁰ This group had also committed robberies in Bosnia to fund the jihad.¹⁹¹ While most of the members of the

¹⁸³ Michael Jonsson and Svante Cornell, "Countering Terrorist Financing: Lessons Learned From Europe," *Georgetown Journal of International Affairs* (Winter/Spring 2007), 70.

¹⁸⁴ Loretta Napoleoni, *Modern Jihad: Tracing the Dollars Behind the Terrorist Networks* (Sterling VA: Pluto Press, 2005), 38.

¹⁸⁵ Michael Jonsson and Svante Cornell, "Countering Terrorist Financing: Lessons Learned From Europe," *Georgetown Journal of International Affairs* (Winter/Spring 2007), 70.

¹⁸⁶ *Ibid.*, 71.

¹⁸⁷ Kim Petersen, "Drug Smuggling Implications for Terrorism," *INTERSEC: The Journal of International Security* 15, no. 1 (January 2005), 6-9.

¹⁸⁸ Stephanie Hanson, "FARC, ELN: Colombia's Left-Wing Guerillas," *Backgrounders*, March 11, 2008, <http://www.cfr.org/publication/9272/> (accessed September 2008).

¹⁸⁹ *Ibid.*

¹⁹⁰ Hayder Mili, "Tangled Webs: Terrorist and Organized Crime Groups," *Terrorism Monitor* 4, no. 1 (Jamestown Foundation, January 12, 2006), <http://jamestown.org/terrorism/news/article.php?articleid=2369866> (accessed June 2008).

¹⁹¹ *Ibid.*

Roubaix gang were killed in shoot-outs with police, a co-leader of this organization Lionel Dumont was sentenced to 30 years in prison in December 2005 for his role in the 1996 armed robberies.¹⁹²

Similarly, the Algerian Armed Islamic Group (GIA) received funding from trafficking in drugs, arms, stolen vehicles and forged documents.¹⁹³ GIA's members continue to fund its activities through its criminal activities.¹⁹⁴ Through these criminal financing efforts, one member, Fateh Kamel, developed links to al Qaeda and the millennium bomber.¹⁹⁵

Hezbollah has raised significant funds through their criminal activities. Through Operation Smokescreen, in 2000 the Bureau of Alcohol, Tobacco and Firearms uncovered a cigarette smuggling ring that bought cigarettes in states with low tax only to resell them in states with a higher tax with profits again being given to Hezbollah.¹⁹⁶ In 2002, the U.S. Drug Enforcement Agency's Operation Mountain Express uncovered a drug ring that smuggled pseudoephedrine, the main ingredient in methamphetamine, from Canada into the Midwest with proceeds being funneled to Hezbollah.¹⁹⁷

There are numerous examples of groups obtaining funding predominantly from drug trafficking. Afghanistan's former Taliban regime financed itself through local

¹⁹² Craig Whitlock, "Trial of French Islamic Radical Sheds Light on Converts' Role," *Washington Post*, January 1, 2006, A01, http://www.washingtonpost.com/wp-dyn/content/article/2005/12/31/AR2005123101056_pf.html (accessed June 2008).

¹⁹³ Hayder Mili, "Tangled Webs: Terrorist and Organized Crime Groups," *Terrorism Monitor* 4, no. 1 (Jamestown Foundation, January 12, 2006), <http://jamestown.org/terrorism/news/article.php?articleid=2369866> (accessed June 2008).

¹⁹⁴ U.S. Department of State, *Country Reports on Terrorism*, (April 20, 2008), <http://www.state.gov/s/ct/rls/crt/2007/103708.htm> (accessed September 2008).

¹⁹⁵ Hayder Mili, "Securing the Northern Front: Canada and the War on Terror," *Terrorism Monitor* 3, no. 14 (Jamestown Foundation, July 15, 2005), <http://www.jamestown.org/terrorism/news/article.php?articleid=2369744> (accessed September 2008).

¹⁹⁶ "U.S. Authorities Bust Cigarette-smuggling Ring Linked to Hezbollah," *CNN*, July 21, 2000, <http://archives.cnn.com/2000/LAW/07/21/charlotte.raids.02/index.html> (accessed September 2008).

¹⁹⁷ "Drug Money for Hezbollah?" *CBS News*, September 1, 2002, <http://www.cbsnews.com/stories/2002/09/01/attack/main520457.shtml> (accessed September 2008).

opium and heroin trade.¹⁹⁸ Additionally, the Kosovo Liberation Army received a large portion of their funds through drug trafficking.¹⁹⁹ The Kurdistan Workers Party also was dependent upon drug trafficking as a source of revenue.²⁰⁰

While al Qaeda itself financed the 9/11 attacks with donations from various sources which include charities and private donors,²⁰¹ the government of the United States has not determined precisely how al Qaeda raises its funds or how they are distributed.²⁰² Charitable organizations however now face increased pressure regarding any possible funding of terrorist groups.²⁰³ The Jamestown Foundation found that due to this increase of pressure, criminal activities including drug trafficking and robbery are quickly becoming a primary source of terrorism funding for al Qaeda.²⁰⁴

B. COLLABORATION OF CRIMINALS AND TERRORISTS

While financing of terrorism through criminal means is well established, there is some speculation as to an emerging trend involving the collaboration of criminals and terrorists. Internationally operating criminal and terrorist groups are increasingly collaborating with one another.²⁰⁵ Both groups are partnering with one another and have increased sharing organizational and operational characteristics.²⁰⁶

¹⁹⁸ Lyudmila Zaitseva, "Organized Crime, Terrorism and Nuclear Trafficking," *Strategic Insights*, VI, no. 5 (August 2007).

¹⁹⁹ Larry E. Craig, "The Kosovo Liberation Army: Does Clinton Policy Support Group with Terror, Drug Ties? From 'Terrorists' to 'Partners'" (United States Senate, Republican Policy Committee, March 31, 1999), <http://www.senate.gov/~rpc/releases/1999/fr033199.htm> (accessed September 2008).

²⁰⁰ Svante E. Cornell, "The Kurdish Question in Turkish Politics," *Orbis* (2001), 31-46.

²⁰¹ John Roth, Douglas Greenburg Serena Wille, "Monograph on Terrorist Financing," Staff Report to the National Commission on Terrorist Attacks Upon the United States, 4.

²⁰² *Ibid.*, 9.

²⁰³ Hayder Mili, "Tangled Webs: Terrorist and Organized Crime Groups," *Terrorism Monitor* 4, no. 1 (Jamestown Foundation, January 12, 2006), <http://jamestown.org/terrorism/news/article.php?articleid=2369866> (accessed June 2008).

²⁰⁴ *Ibid.*

²⁰⁵ Louise Shelley, "The Unholy Trinity: Transnational Crime, Corruption and Terrorism," *Brown Journal of World Affairs* XI, no. 2 (2005): 101-111.

²⁰⁶ Thomas M. Sanderson, "Transnational Terror and Organized Crime: Blurring the Lines," *SAIS Review* XXIV, no. 1 (2004): 49.

Just one example of this can be seen in the Madrid train attacks. Jamal Ahmidan, a leader of the Madrid attacks, was a common criminal with previous arrests for murder and drug dealing.²⁰⁷ His ties to a criminal network were instrumental in the carrying out of this terrorist attack. Specifically, he used the connections from his criminal network to obtain the explosives used in the Madrid train attack.²⁰⁸

There also remains concern of terrorists collaborating with transnational gangs such as MS-13.²⁰⁹ Since MS-13 is often involved with drug smugglers and human traffickers, there is concern that terrorists may seek an alliance with a transnational gang in order to secure entry into the United States.²¹⁰ It was reported in 2004 that an al Qaeda member was spotted in Honduras meeting with MS-13 leaders perhaps seeking to arrange his illegal entry into the United States.²¹¹ Additionally, it was reported that a 2005 DEA memo suggests that Middle Eastern terrorist cells operating in the United States have collaborated with drug smuggling gangs such as MS-13 with proceeds from their illegal activities going to fund terrorist operations overseas.²¹² While the former director of the FBI's MS-13 task force claims that the link between al Qaeda and MS-13 is "improbable"²¹³ the former ICE Assistant Secretary Michael Garcia warned in testimony before Congress that there remains a threat that "any criminal organization that exploits our borders for profit could, for the right price, bring in terrorists or bring in components of weapons of mass destruction."²¹⁴

²⁰⁷ Andrea Elliot, "Where Boys Grow Up to be Jihadis," *New York Times Magazine*, November 25, 2007 <http://www.nytimes.com/2007/11/25/magazine/25tetouan-t.html?pagewanted=4& r=1> (accessed October 2008).

²⁰⁸ Luis Del Pino, "3/11: The Amazing Life and Death of Jamal Ahmidan," *Libertad Digital*, (October 5, 2005) <http://www.freerepublic.com/focus/f-news/1759155/posts> (accessed October 2008).

²⁰⁹ Jessica M. Vaughn and Jon D. Feere, "Taking Back the Streets: ICE and Local Law Enforcement Target Immigrant Gangs," *Backgrounder, Center for Immigration Studies*, October 2008, 11.

²¹⁰ Ibid.

²¹¹ Jerry Seper, "Al Qaeda Seeks Tie to Local Gangs," *Washington Times*, September 28, 2004.

²¹² Sara A. Carter, "Terrorists Teaming with Drug Cartels," *Washington Times*, August 8, 2007.

²¹³ Jessica M. Vaughn and Jon D. Feere, "Taking Back the Streets: ICE and Local Law Enforcement Target Immigrant Gangs," *Backgrounder, Center for Immigration Studies*, October 2008, 11.

²¹⁴ Statement of Michael J. Garcia, Assistant Secretary for Immigration and Customs Enforcement, "Immigration and the Alien Gang Epidemic: Problems and Solutions," before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims, April 13, 2005.

One possible explanation for this trend of terrorists collaborating and developing their own criminal capabilities is law enforcement's increase in scrutiny given to charitable organizations that were once a large source of funding.²¹⁵ There exists a possible "transformation" where a terrorist organization's financial needs are causing the alignment to criminal enterprise and organized crime.²¹⁶ Enabling this trend has also been linked with globalization of the world's communication, travel and economics.²¹⁷

C. REMOVAL OF CRIMINAL ALIENS

An examination of the possible alignment of terrorist and criminal entities as well as the examination of the undeniable historical link between criminal activity and the funding of terrorist organizations only affirms the need to remove criminal aliens from the United States. The removal of these criminal aliens is likely to disrupt the funding of terrorist organizations. This disruption of funding could lead to the dissolution of terrorist networks. While the removed aliens may continue their criminal ways in their home country, their removal from the United States, aside from the benefit of decreasing crime itself, would decrease American dollars being funneled from criminal enterprise to terrorist organizations.

²¹⁵ Thomas M. Sanderson, "Transnational Terror and Organized Crime: Blurring the Lines," *SAIS Review*. XXIV, no. 1 (2004): 50.

²¹⁶ Chris Dishman, "Terrorism, Crime and Transformation," *Studies in Conflict and Terrorism* 24 (2001):44.

²¹⁷ Thomas M. Sanderson, "Transnational Terror and Organized Crime: Blurring the Lines," *SAIS Review* XXIV, no. 1 (2004): 51.

V. RESEARCH RESULT

The continued presence of criminal aliens in the United States represents a significant threat to the security of the homeland. With possible radicalization in the prison environment as well as possible financing of terrorism through criminal activity, an effective and efficient means to remove the criminal aliens from the United States needs to be developed and implemented. This thesis explores several ways that ICE and the law enforcement community can accomplish identification, detention and removal of criminal aliens in an effective and efficient manner.

The research conducted for this thesis was done through in-depth interviews. Officials from ICE's DRO were interviewed for over a three-month period. All those interviewed were informed that research was being conducted for this thesis. After being assured anonymity, they were informed that personal opinions and candid responses were sought to achieve a better understanding of where possible areas of improvement lie within the CAP.²¹⁸ A sampling of DRO officials was selected from ICE offices from diverse geographical locations. The officials interviewed are from large, medium and small sized ICE field offices. They have numerous years of experience with ICE and legacy INS. They hold a variety of management and supervisory positions within DRO including Field Office Directors, Assistant Field Office Directors and Supervisory Deportation Officers. Also interviewed was a member of New York's Joint Terrorism Task Force (JTTF) and a high-ranking official in the New York Police Department's Counterterrorism Unit.

Participation in the interview process was on a voluntary basis. Those interviewed were assured that their responses would remain anonymous unless they consented to the disclosure of their identity. The interviews were conducted both telephonically and in person and those participating were asked the same series of questions with slight variation and follow-up questions. The purpose of these interviews

²¹⁸ The opinions expressed herein are solely those of the individuals interviewed in his/her individual capacity, and do not necessarily represent the views of the Immigration and Customs Enforcement, Department of Homeland Security, or the U.S. government.

with DRO officials was to determine the best practices being employed by DRO officials nationwide for the most effective and efficient means of removing criminal aliens from the United States. The purpose of the interviews with members of New York's counterterrorism community was to ascertain where ICE's CAP fits within the nation's homeland security strategy.

The DRO officials interviewed agree that the effectiveness of ICE's CAP should be measured by the number of criminal aliens identified and referred to ICE and the number of removals of those aliens. There are a variety of factors that effect ICE's defined effectiveness. These factors include funding and resources, outreach and collaboration, solutions addressing bed-space issues and concern for change in political climate.

The counterterrorism experts consulted see a definitive link between criminal activity and terrorism. The use of criminal charges to neutralize a terrorist threat was seen as an effective counterterrorist measure. Punishing wrongdoers with the application of the rule of law is a "major tenet of officially expressed U.S. counterterrorist policy."²¹⁹ However, the individuals interviewed were unaware of ICE's efforts regarding the CAP or how it relates to any U.S. counterterrorism strategy.

A. FUNDING AND RESOURCES

DRO was tasked with taking over ICE's CAP from the Office of Investigations (OI) in September 2006 and officially took over the program in April 2007. ICE's criminal alien arrest procedures are now tasked to one entity. All DRO officials interviewed cited to the tremendous increase in criminal aliens identified since DRO took control of all aspects of CAP.

With the increase of its area of responsibility, the primary concern of ICE DRO officials in fulfilling their mission to identify, detain and remove all criminal aliens in the United States remains available resources and funding. As one official explained it, DRO is now tasked with identifying criminal aliens at the local and county level under the

²¹⁹ Paul R. Pillar, *Terrorism and U.S. Foreign Policy* (Brookings Institution Press: Washington, D.C. 2001), 80.

Secure Communities Strategic Plan with current funding and staffing levels.²²⁰ Their jurisdiction has expanded without the corresponding expansion of resources. Such a tasking is challenging for numerous reasons.

Adding to DRO's lack of additional funding, geographical distance from the local and county jail facilities presents the next largest hurdle in accomplishing ICE's CAP mission. One DRO official described their current jurisdiction as encompassing six states.²²¹ Another's jurisdiction included one of the most populated areas in the nation.²²² In practical terms, an ICE field office can be hundreds of miles and several hours from the facilities they are now tasked with covering. Face to face meetings with local officials is difficult and sporadic at best. Given the size of the jurisdiction of some ICE field offices, having the manpower to physically go to each jail facility within their jurisdiction is not possible given current staffing levels.

DRO officials agree that they do not have enough staff to provide 24/7 coverage to their local and county facilities. At best, they provide coverage of these facilities during normal business hours. In practical terms, if a criminal alien is arrested by local law enforcement in the middle of the night, that alien could bond out prior to ICE even being notified.

To demonstrate what can be accomplished with 24/7 coverage, DRO has initiated a number of "CAP surges" throughout the United States. A CAP surge entails DRO staffing one selected local or county jail on a 24/7 basis for a given time period. This ensures that 100% of the criminal aliens encountered are identified and processed. ICE is also piloting a Law Enforcement Agency Response Unit (LEAR) that is dedicated to responding to law enforcement calls for assistance regarding both criminal and non-criminal aliens encountered on a 24/7 basis.²²³ The increase in the number of criminal aliens encountered through these initiatives will be used to demonstrate the need for more funding and possibly lead to 24/7 ICE coverage at local and county jails.

²²⁰ Anonymous DRO official, interviewed by author on October 2, 2008.

²²¹ Ibid.

²²² Anonymous DRO official, interviewed by author on August 29, 2008.

²²³ Anonymous DRO official, interviewed by author on October 2, 2008.

In addition to not having enough staff, numerous DRO officials cited to lacking the appropriate resources to accomplish its mission. The resources enumerated as deficient include office space, computer equipment and vehicles. Vehicles are needed to transport the DRO staff during the identification and screening process as well for the transport of the criminal aliens released to ICE's custody.

Some DRO officials cited to the use of technology through telephonic and VTC equipment to alleviate the need for ICE agents to travel physically from site to site. ICE agents cannot rely on the use of VTC due to existing language barriers or the need to fingerprint the criminal aliens and complete the identification process.²²⁴ The use of technology also cannot take the place of an ICE agent who is needed to affect an arrest and transport the criminal aliens to an ICE detention facility. Indeed, the technology often is not in place at the local and county facilities.

Currently, where an Inter-Governmental Service Agreement is not in place,²²⁵ Immigration Enforcement Agents (IEAs) physically transport criminal aliens from federal, state, local or county jails to ICE detention facilities.²²⁶ Often the jail and the ICE detention facility are not within physical proximity to one another. Indeed, a criminal alien is often transported across state lines to the only available bed-space. As such, a large portion of the IEA's time is spent transporting criminal aliens rather than identifying and processing them when first notified by correctional or law enforcement officials.²²⁷

B. OUTREACH AND COLLABORATION

1. Local Law Enforcement

In expanding CAP to the local and county level, developing relationships with local law enforcement at these levels is instrumental in developing a collaborative work

²²⁴ Anonymous DRO official, interviewed by author on October 15, 2008.

²²⁵ Inter-Governmental Service Agreements are in place in several offices allowing for the allocation of transportation duties to an outside agency.

²²⁶ Anonymous DRO official, interviewed by author on October 10, 2008.

²²⁷ Ibid.

environment. These relationships are developed and nurtured through face-to-face contact and consistent interaction with ICE officials. Local law enforcement needs to stay informed about whom to contact should a criminal alien be encountered. The relationship that exists between local law enforcement and ICE varies from jurisdiction to jurisdiction. Some DRO officials extolled their office's ability to have relationships with local and county corrections departments as well as local probation departments.²²⁸ Others were still developing these relationships.

A significant impediment to the development of personal relationships with local law enforcement remains geographical proximity. As one DRO official explained, their office has great working relationships with local law enforcement offices that are physically located close to the ICE field office. However, as the physical distance between the ICE field office and the local law enforcement offices grew, the strength of the collaborative relationship decreased.²²⁹ This official conceded that their office doesn't visit distant local law enforcement offices more than once a year.²³⁰

Local law enforcement also needs to be informed about ICE procedures and ICE's ability to pick up an identified criminal alien. ICE's Office of State and Local Coordination (OSLC) has made significant improvements to outreach efforts. Indeed, ICE Access is a program presented at various local law enforcement conferences. One of the biggest hurdles identified is the lack of a Memorandum of Understanding between local law enforcement and ICE. One DRO official identified the need for a Standard Operating Procedure concerning criminal aliens identified by local law enforcement during "off" hours.²³¹ As stated above, most ICE offices do not have the capability to respond to local law enforcement on a 24/7 basis.

Local law enforcement within sanctuary jurisdictions pose a significant impediment to ICE's ability to identify, detain and remove criminal aliens. DRO officials report having no contact whatsoever with local law enforcement from sanctuary

²²⁸ Anonymous DRO official, interviewed by author on October 15, 2008.

²²⁹ Anonymous DRO official, interviewed by author on October 2, 2008.

²³⁰ Ibid.

²³¹ Anonymous DRO official, interviewed by author on October 10, 2008.

jurisdictions. Such jurisdictions will not provide ICE with a list of foreign-born criminal aliens encountered and refuse to let ICE into their facilities to conduct interviews. The basic tenets that led to the creation of sanctuary cities are that local law enforcement does not want their residents to be afraid of the police in the area of reporting crime. However, these tenets are inapplicable to ICE's CAP mission. Under Secure Communities, ICE continues its enforcement efforts not by going into the community and detaining every illegal alien as some sanctuary city advocates maintain. Instead, ICE's CAP focuses exclusively on individuals who have already broken the law and are already in law enforcement's custody. More outreach is needed to these sanctuary jurisdictions to educate local law enforcement about their significant role in ICE's CAP and that CAP does not undermine the tenets of their sanctuary jurisdiction.

In contrast to sanctuary cities, some local law enforcement are actively using ICE to rid their streets of "unwanted" immigrants. A DRO official cited to numerous instances where an alien is arrested on criminal charges and ICE is contacted. As soon as ICE lodges a detainer on the alien, all criminal charges against the alien are dropped.²³² In effect, this ensures that the alien is removed from their community with little to no effort or expense to that community. The abuse of ICE's CAP program in instances such as this must be addressed with the communities involved.

2. 287(g) Authority

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) enacted 1996 added a provision, Section 287(g), in which state officers and employees may be authorized to perform immigration officer functions.²³³ The Secretary of the Department of Homeland Security has the authority to enter into agreements with state and local law enforcement permitting them to perform immigration officer functions,

²³² Anonymous DRO official, interviewed by author on October 2, 2008.

²³³ U.S. Congress, The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

with the requisite training, pursuant to a Memorandum of Agreement (MOA).²³⁴ Currently there are only 63 active 287(g) MOAs with 840 trained officers in twenty states in the entire United States.²³⁵

While this 287(g) program trains local law enforcement, it is the local field offices that remain responsible to supervise these local law enforcement officials. With the supervision by ICE, local law enforcement is then able to act as an ICE official themselves having the full authority to arrest and detain aliens based upon immigration law violations. Unfortunately, the majority of DRO officials interviewed did not have 287(g) trained local law enforcement within their jurisdiction.

Those offices that did have 287(g) trained officials under them touted the program as a force multiplier and integral to the success of one ICE office.²³⁶ Several DRO officials stated that local law enforcement's 287(g) capabilities was essential to enforcing immigration laws in physically remote areas. While requiring a significant amount of supervision by ICE, the program nonetheless afforded ICE officials to allocate resources to other jurisdictions without similar capabilities. Accordingly, these ICE offices were able to assure 100% screening of criminal aliens within their jurisdiction.

Even with its touted benefits, there remains concern about the possible abuse of the 287(g) program by local law enforcement. One DRO official cited the possible use of 287(g) authority to "clean up" the streets of their community by deporting those deemed undesirable.²³⁷ Possible racial profiling was yet another concern.²³⁸ Overall, there remains a general consensus that 287(g) authority would be most effective in a corrections environment. Corrections officials would be able to identify and process all foreign-born inmates. This would include conducting appropriate checks in ICE's

²³⁴ Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. 1101, et seq. (2000), INA Section 287(g).

²³⁵ U.S. Immigration and Customs Enforcement, "Delegation of Immigration authority Section 287(g) Immigration and Nationality Act," (August 18, 2008), http://www.ice.gov/partners/287g/section_287_g.htm (accessed October 2008).

²³⁶ Anonymous DRO official, interviewed by author on October 2, 2008.

²³⁷ Anonymous DRO official, interviewed by author on October 10, 2008.

²³⁸ Ibid.

databases and the ability to detain the inmates on immigration violations. This would allow ICE to redistribute its resources to the local and county levels ensuring that no criminal alien escapes being processed through the immigration system.

3. Executive Office for Immigration Review

Most DRO officials were satisfied with their relationship with EOIR. One area of expressed dissatisfaction with EOIR involved stipulated removals. A particular office could not pursue stipulated removals with detained aliens due to the Immigration Judge's unwillingness to sign orders of removal from a stipulated removal within their jurisdiction.²³⁹ A distinct lack of trust exists between DRO and EOIR such that Immigration Judges do not feel aliens would voluntarily stipulate to removal from the United States. The Immigration Judges' refusal to adjudicate stipulated removals was described as a significant hindrance to DRO's ability to effectively remove aliens.²⁴⁰ While stipulated removals do not necessarily involve criminal aliens, it impacts ICE's ability to make bed-space available for criminal aliens rather than being tied up with non-criminal aliens who simply want to return to their native country rather than be detained by ICE.

Another area of dissatisfaction remains EOIR's willingness to conduct immigration hearings using VTC capabilities. Despite having the legal authority to conduct immigration hearings via VTC, some Immigration Judges still insist on an alien being physically brought to their immigration courtroom. This is a significant drain on DRO's resources since manpower is needed to transport the alien to their immigration hearing. This manpower could be used more effectively in the identifying and processing criminal aliens at the local and county level. To address and possibly remedy these concerns, DRO has set up a number of meetings with EOIR officials.

Even if willing to conduct hearings via VTC, some EOIR courtrooms lack the requisite equipment. Some lack VTC equipment all together while others have outdated VTC technology. Budget restraints prevent EOIR from obtaining VTC capability.

²³⁹ Anonymous DRO official, interviewed by author on October 2, 2008.

²⁴⁰ Ibid.

Additionally, since ICE is an agency within the Department of Homeland Security and EOIR is an agency within Department of Justice, ICE cannot simply give EOIR the equipment it needs.

DRO officials in the field were unaware of any collaboration with EOIR about any possible expansion of the Immigration Court's jurisdiction to include local and county jails. Most were skeptical as to the ability to conduct immigration hearings while a criminal alien was in the custody of local and county officials. The high rate of turnover combined with the likelihood of an alien's release prior to an immigration hearing were the most often cited concerns.

4. U.S. Attorney Offices

Working relationships between ICE and local U.S. Attorney offices was consistently described as excellent. Despite this excellent collaborative working relationship, one area of concern remains the percentage of illegal reentry cases²⁴¹ presented to the U.S. Attorney Office, which are accepted for prosecution. While there appears to be great variance from office to office, the U.S. Attorney offices that are not on the Mexican border declined to prosecute a majority of the cases presented to them by ICE officials.²⁴² While one DRO office along the border explained that their U.S. Attorney's office prosecutes all reentry cases presented, a DRO official from an interior ICE office explained that their office has a 30% rate of acceptance for prosecution.²⁴³ Each U.S. Attorney's office has developed their own criteria for acceptance of illegal reentry cases for each jurisdiction. There appears to be a surge in prosecutions of these types of cases in certain jurisdictions. For example, illegal reentry cases have become the single most prosecuted crime by the U.S. Attorney's office in Los Angeles.²⁴⁴ In contrast, a DRO official from an interior ICE office stated that for the case to be accepted

²⁴¹ An alien previously removed but present in the United States can be prosecuted for illegal reentry pursuant to 18 USC § 1326. An alien convicted of illegal reentry after removal faces a maximum of twenty years incarceration.

²⁴² Anonymous DRO official, interviewed by author on October 2, 2008.

²⁴³ Ibid.

²⁴⁴ "U.S. Tries to Shut Revolving Door of Illegal Reentry," *Los Angeles Times*, March 16, 2008, <http://articles.latimes.com/2008/mar/16/local/me-crackdown16> (accessed October 2008).

by the U.S. Attorney's Office in their jurisdiction, the alien must have reentered the United States at least five times or been convicted of an aggravated felony.²⁴⁵ Regardless of the criteria set by the U.S. Attorney's office, some DRO offices present every reentry case for prosecution.²⁴⁶

Workload and staffing levels of the U.S. Attorney's office hinder their ability to prosecute cases presented by ICE officials. An interviewed DRO official could not understand the workload argument because the majority of the work in prosecuting the case is done by the ICE agent assigned to the case.²⁴⁷ This official described re-entry cases as "easy" wins for the U.S. Attorney's office.²⁴⁸ Special Assistant United States Attorneys (SAUSAs), ICE attorneys assigned to the U.S. Attorney's office in their jurisdiction to aid in the adjudication of both criminal and civil immigration matters, could be used to address staffing shortages in the U.S. Attorney's Offices.

5. Consulates and Embassies

DRO interacts with consulates and embassies in processing an alien for removal when securing travel documents for the foreign nationals in their custody. DRO's relationship with consulates and embassies varies greatly and depends on the country involved. Most Central and Southern American countries are responsive to ICE requests for the requisite travel documents. In fact, DRO officials nationwide touted the success of the Electronic Travel Document system (eTD) where ICE now obtains travel documents for aliens from Central America within 24 hours. It is hoped that the eTD will be expanded to other countries in the future.

Other countries' responses to ICE's request for a travel document are slow to non-existent. Some are extremely hesitant to assist in the return of their nationals who have committed crimes in the United States fearing an increase in crime in their own

²⁴⁵ Anonymous DRO official, interviewed by author on October 2, 2008.

²⁴⁶ Ibid.

²⁴⁷ Anonymous DRO official, interviewed by author on October 15, 2008.

²⁴⁸ Ibid.

country.²⁴⁹ Additionally, a DRO official speculated that other countries economies are dependent upon their nationals funneling dollars earned in the United States back into their own economy.²⁵⁰ When their nationals are removed from the United States, the amount of money pumped into their economy decreases. As a result, some consulates are markedly slow to issue travel documents.

There exist a number of countries that do not have a diplomatic relationship with the United States. Not only is ICE unable to obtain travel documents for these criminal aliens, ICE is unable to enforce removal orders from these countries. Cuban nationals are just one example of criminal aliens against whom a removal order is often ineffective. Prior to 2001, ICE officials were indefinitely detaining criminal aliens with little to no hope of enforcing a removal order. In light of the Supreme Court's decision in *Zavydas*,²⁵¹ ICE has no choice but to release these criminal aliens back into the general population when there exists no likelihood of removal.

When the United States does have a diplomatic relationship with a given country, the issuance of travel documents requires an interview by the consulate to ensure that the alien is in fact from the stated country. While some consulates conduct telephonic interviews, ICE is often left to transport the alien to the consulate for an in-person travel document interview. Instead of transporting each individual alien, ICE often arranges to transport an employee from the consulate to conduct the interview to where the alien is housed. Most consulates do not have the capability to conduct these interviews via VTC. A DRO official speculated that the consulates are unwilling to explore VTC options for conducting interviews because they would lose a significant perk – travel across the country at the expense of the U.S. government.²⁵²

²⁴⁹ Anonymous DRO official, interviewed by author on October 2, 2008.

²⁵⁰ *Ibid.*

²⁵¹ *Zavydas v. Davis*, 533 U.S. 533 (2001) and *Clark v. Martinez*, 543 U.S. 371 (2005) (mandating the release of criminal and other high risk aliens after 180 days if the alien's removal is not likely to occur in the reasonably foreseeable future).

²⁵² Anonymous DRO official, interviewed by author on October 2, 2008.

C. SOLUTIONS ADDRESSING BED-SPACE

With the significant increase of criminal aliens being identified under the expansion of CAP to the local and county levels, solutions addressing bed-space must be developed in order for DRO to effectively accomplish its mission. DRO officials unanimously agreed that there exists a significant need for additional bed-space. Detaining criminal aliens is the most effective way to ensure their removal from the United States. However, this requires a substantial increase in funding to either construct additional ICE detention facilities or secure bed-space through Inter-Government Service Agreements (IGSAs) with local jails. In 2006, it was estimated that an additional 35,000 beds at a cost of 1.1 billion dollars would be needed to detain all CAP aliens and aliens from countries designated as special interest countries known for promoting terrorism.²⁵³

1. Stipulated and Administrative Removals

Rather than creating more bed-space, the turn around time from initial detention by ICE to removal from the United States was examined. DRO officials agree that stipulated removals and administrative removals increase DRO's speed in effecting a removal from the United States freeing up much needed bed-space. Some jurisdictions concede, however, that they have not fully explored the use of stipulated removals and administrative removals. Indeed, one jurisdiction does not use administrative removals whatsoever conceding that there has been no directive from ICE headquarters mandating their use. Manpower appeared to be the biggest barrier to implementing the use of more administrative removals. The barrier standing in the way of DRO's use of more stipulated removals appears to be EOIR's willingness to adjudicate stipulated removals.

2. Rapid REPAT

Launched in 2008, ICE's Rapid REPAT initiative was favorably seen in the eyes of DRO officials. This program encourages states to enact laws that allow for the early parole of non-violent criminal aliens where they agree to removal from the United States. There exist guidelines such that a criminal must have served half their minimum sentence

²⁵³ "Detention and Removal of Illegal Aliens," Department of Homeland Security, Office of Inspector General, OIG-06-33, April 2006, 2.

in order to be considered for Rapid REPAT. These programs encourage criminal aliens to not fight their immigration cases in Immigration Court. By avoiding litigation that delays the removal process, bed-space is made available more quickly. Currently, only New York, Arizona, Puerto Rico, Rhode Island, and Georgia have such laws in effect.

3. Travel Documents

Another impediment to the quick removal of criminal aliens from the United States is the speed at which ICE can obtain travel documents from consulates. In dealing with aliens other than Mexicans (OTMs),²⁵⁴ ICE has had limited success in obtaining travel documents in a timely fashion. The eTD system that is used to obtain travel documents for aliens originating from Central America has been extremely successful. However, for aliens not originating from a Central American country, ICE currently starts the process of obtaining travel documents for criminal aliens only when these aliens are physically in ICE's custody. ICE needs to obtain these documents in close proximity to the alien's actual removal because currently travel documents issued by the various consulates have expiration dates. No official interviewed could explain why these travel documents have expiration dates. Indeed, no DRO official was aware of whether travel documents could be obtained without expiration dates.

4. Detention Alternatives

Alternatives to detention were explored with the DRO officials interviewed. Experience with such programs varied by jurisdiction. One DRO official was adamant that alternatives to detention should not be used for any criminal alien whether or not they were subject to mandatory detention.²⁵⁵ Under Secure Communities, ICE cannot now identify and process all criminal aliens present in the United States only to release them back into the population.²⁵⁶

²⁵⁴ ICE apparently does not have difficulty obtaining travel documents for Mexican aliens.

²⁵⁵ Anonymous DRO official, interviewed by author on October 2, 2008.

²⁵⁶ Ibid.

Alternatives to detention can be used with non-criminal aliens freeing up much needed bed-space for the worst of the worst. Alternatives employed by ICE to date include the Intensive Supervisory Alien Program (ISAP) and electronic monitoring.²⁵⁷ The ISAP closely monitors aliens throughout the removal process while allowing them to remain free in American society. Electronic monitoring of aliens involves the alien wearing an ankle bracelet on a 24/7 basis. Both programs have been successful in monitoring aliens outside of actual detention and seen success in their actual removal. Each jurisdiction however has a limited availability for these programs – one jurisdiction had the capability of only monitoring 100 aliens via ankle bracelet.²⁵⁸ The capability of these alternative detention programs is dependent upon the requisite funding needed to support them.

D. CHANGE IN POLITICAL CLIMATE

There remains an overwhelming concern by DRO officials about any change in political climate. Historically, enforcement of immigration laws was dependent upon the Executive and Legislative Branches' initiatives. Immigration is a political issue at its heart and depends upon the current political climate. Typically, in times of economic downturn, fears of illegal immigration and accompanying cheap labor that undermines American workers lead politicians to push immigration to the foreground. After 9/11, Congress demanded greater security in our legal immigration and the hardening of our borders against illegal immigration in order to thwart the efforts of terrorists seeking entry through our borders. Accordingly, ICE saw tremendous increases to its budget in the years following the 9/11 attacks.

There has been much talk recently about the need for immigration reform. While the latest immigration reform initiative failed in Congress in 2007,²⁵⁹ there still remains

²⁵⁷ No DRO official interviewed knew of any other alternative to detention program being piloted by ICE.

²⁵⁸ Anonymous DRO official, interviewed by author on October 9, 2008.

²⁵⁹ "Senate Immigration Bill Suffers Crushing Defeat," *CNN.com* (Washington, June 28, 2007, <http://edition.cnn.com/2007/POLITICS/06/28/immigration.congress/index.html>) (accessed October 2008).

the possibility of the enactment of new laws. The funding allocated to ICE initiatives is directly tied to the political climate. Without a supportive Congress and Administration, the expansion of CAP to the local and county level cannot occur.

E. USING CAP IN OUR NATIONAL HOMELAND SECURITY STRATEGY

When an alien with potential terrorist ties is encountered, often basic immigration charges are used to remove them from the United States. There are numerous grounds of removability under the Immigration and Nationality Act²⁶⁰ – overstaying a visa, entering without inspection, being convicted of certain crimes, failing to maintain status (failing to attend school or being employed while in the country on a student or visitor visa). A person is put into removal proceedings with the issuance of a Notice to Appear and will appear before an Immigration Judge who determines whether the charges are sustained and whether the respondent has any relief from removal.

ICE keeps the end-game in mind when placing a person of significant national security interest into removal proceedings. These cases are often referred to ICE from the JTTF. The evidence of a person's terrorist ties is often classified and/or comes from confidential sources.²⁶¹ Because a person with suspected ties is not brought up on terrorist charges, their links to terrorism are often never disclosed.²⁶² There is often very little admissible evidence relating to their terrorist ties that can be used in a court of law. Similar to Al Capone being convicted of tax evasion, any available law enforcement tool is used to ensure the person of interest is processed and possibly removed.²⁶³ Indeed, the JTTF interview disclosed that once an individual becomes a person of interest, investigators often look for criminal activity or immigration violations.²⁶⁴ Basic immigration violations are used in these national security cases to ensure that the end-game of getting the suspected terrorists out of the country as quickly as possible.

²⁶⁰ Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. 1101, et seq. (2000).

²⁶¹ Anonymous JTTF official, interviewed by author on October 21, 2008.

²⁶² Ibid.

²⁶³ Anonymous NYPD official, interviewed by author on October 21, 2008.

²⁶⁴ Anonymous JTTF official, interviewed by author on October 21, 2008.

Criminal aliens pose a unique threat to homeland security. Their criminal ties often provide a network that terrorists find appealing.²⁶⁵ Methods employed by drug traffickers to get their product into the United States may be used to smuggle explosive devices or other weapons into this country.²⁶⁶ Similarly, terrorists may be smuggled into the United States with the aid of human traffickers.²⁶⁷ While removal of these individuals from the United States may neutralize an immediate threat, there still exists concern about our ability to track these individuals once they are removed.²⁶⁸

In addition to posing a unique threat, criminal aliens also provide a unique opportunity for law enforcement. They often provide information about individuals or other criminal activity that might be of interest to the United States.²⁶⁹ Additionally, law enforcement officials are frequently able to recruit these individuals as sources within their ethnic community.²⁷⁰

²⁶⁵ Anonymous NYPD official, interviewed by author on October 21, 2008.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ Anonymous JTTF official, interviewed by author on October 21, 2008.

²⁷⁰ Anonymous NYPD official, interviewed by author on October 21, 2008.

VI. A MEGACOMMUNITY SOLUTION

A “megacommunity” has been defined as “communities of organizations whose leaders and members have deliberately come together across national, organizational, and sectoral boundaries to reach the goals they cannot achieve alone.”²⁷¹ A uniting goal propels the group toward a harmonious and sustained working relationship for the long term.²⁷² A megacommunity “demand[s] a change in orientation from the leaders of the various organizations involved.”²⁷³

Through Secure Communities, ICE is attempting to change how every level of law enforcement views the individuals it encounters. Current processes must be altered to develop the most effective and efficient means of identifying, detaining and removing criminal aliens that are encountered. Accomplishing this change will necessarily involve conquering both tangible and intangible hurdles.

In the book *Blue Ocean Strategy*, the authors studied how change was accomplished in over one hundred and fifty companies and organizations from a variety of public and private industries.²⁷⁴ While private companies who are profit driven differ markedly from government agencies in many respects, much can be learned from the successful strategic planning explored by the authors.

The authors set forth four organization hurdles to strategy execution: “the cognitive hurdle that blinds employees from seeing that radical change is necessary; the resource hurdle that is endemic in firms; the motivational hurdle that discourages and demoralizes staff; and the political hurdle of internal and external resistance to change.”²⁷⁵ The authors explore how these hurdles are overcome through a tipping-point

²⁷¹ Mark Gerencser, Reginald Van Lee, Fernando Mapolitano and Christopher Kelly, *Megacommunities: How Leaders of Government, Business and Non-Profits Can tackle Today's Global Challenges Together* (Palgrave Macmillan, 2008), 28.

²⁷² *Ibid.*, 29.

²⁷³ *Ibid.*

²⁷⁴ W. Chan Kin and Renee Mauborgne, *Blue Ocean Strategy* (Boston: Harvard Business School Press, 2005).

²⁷⁵ *Ibid.*, 150.

theory. Tipping-point theory “hinges on the insight that in any organization, fundamental changes can happen quickly when the beliefs and energies of a critical mass of people create an epidemic movement toward an idea.”²⁷⁶ It is this tipping point that ICE needs to create overcoming both cognitive and resource hurdles in order to expand the Criminal Alien Program to all levels of law enforcement.

A. LOCAL AND COUNTY JAILS, ICE, EOIR, U.S. ATTORNEYS AND CONSULATES AS MEGACOMMUNITY

ICE is currently drafting its Secure Communities strategic plan. The document itself is important as it will provide a guide for ICE management. The plan, however, is not as important as the trust-based relationships that need to be developed in order to accomplish ICE’s enumerated goals in the expansion of the CAP. Indeed, in April 2008, Assistant Secretary Julie Meyers issued a memorandum entitled Community Outreach setting forth the importance of establishing enhanced levels of trust and confidence with all involved stakeholders in order to accomplish ICE’s mission.²⁷⁷ In addition to issuing its Secure Communities strategic plan, ICE needs to rally all stakeholders into a megacommunity that reaches its tipping point moving forward with the expansion of the CAP at all levels of law enforcement.

Applying lessons learned from the relationship of legacy INS, NYDOCs and EOIR, ICE’s expansion of its CAP at all local and county jails must involve the development of a symbiotic working relationship. The research from this thesis demonstrates that ICE’s DRO field office managers believe that cooperative relationships between ICE and local law enforcement essential to achieving expansion of the CAP. All parties must understand the wants and needs of those involved. Only then can common goals be defined and a working structure developed.²⁷⁸

²⁷⁶ W. Chan Kin and Renee Mauborgne, *Blue Ocean Strategy* (Boston: Harvard Business School Press, 2005), 151.

²⁷⁷ Julie L. Myers, Assistant Secretary, Immigration and Customs Enforcement, *Community Outreach*, (Memorandum, April 14, 2008).

²⁷⁸ Mark Gerencser, Reginald Van Lee, Fernando Mapolitano and Christopher Kelly, *Megacommunities: How Leaders of Government, Business and Non-Profits Can tackle Today’s Global Challenges Together* (Palgrave Macmillan, 2008), 147.

Lines of communication must be established that are effective and efficient for all parties. Several interviewees reported that certain DRO field offices are responsible for a large geographic jurisdiction that often span several states and hundreds of miles. The proximity of local law enforcement to an ICE field office directly relates to the quality of the cooperative relationship that develops. Therefore, geographic limitations mandate that electronic means of communication between local and county officials and ICE be developed. Regular telephone calls or email communications will solidify a cooperative working relationship and remind local law enforcement of their key role in securing the homeland against criminal aliens.

Initially, local and county officials must be educated regarding their responsibility to identify foreign-born individuals to be interviewed by ICE. A “sanctuary” attitude must be eliminated so that law enforcement is working toward the same goal of removing criminal aliens from the United States. While ICE’s education of local law enforcement may be sufficient to establish a cooperative environment, it may be necessary to reach out to state leadership to eliminate sanctuary policies to clear the way for cooperation with ICE. No longer should a particular city’s sanctuary attitudes be allowed to determine the level of cooperation ICE receives in identifying criminal aliens. Only when the cognitive hurdle of “sanctuary” attitudes by local law enforcement encountered by ICE agents on a regular basis is eliminated, will cooperation be allowed to flourish.

Integration of technology will assist local law enforcement. Local law enforcement must have access to immigration records when a criminal is encountered. When a person’s biometric information is run through the FBI’s NCIC database, it should simultaneously pull information from ICE’s records without having to make a separate query. While the interviewees concede that ICE does not currently provide 24/7 coverage of local detention facilities, local law enforcement must nonetheless be given access to all relevant information necessary to perform their role within ICE’s Secure Communities plan. To date, pilot programs have been launched by ICE to link jails in six counties in North Carolina and Texas to allow local authorities to access immigration databases in addition to the FBI’s Integrated Automated Fingerprint Identification System

of criminal records.²⁷⁹ Such interoperability must continue to expand nationwide to empower local law enforcement with the tools necessary to identify foreign born criminal aliens. Assistant Secretary Julie Meyers stated that “Interoperability will create a virtual ICE presence at every local jail, allowing us to identify and ultimately remove dangerous incarcerated criminal aliens from our communities.”²⁸⁰

While local law enforcement requires information to perform their role, likewise, ICE has certain needs in order to perform their role within the CAP efficiently. The majority of the interviewees stated that local law enforcement was cooperative in assisting ICE in obtaining the requisite documentation. Local law enforcement must continue to be educated as to their integral role in generating the information necessary for ICE to accomplish its mission to identify, detain and remove all criminal aliens. The information necessary for ICE to move forward with removal proceedings must be secured from a suspected foreign-born individual. This can be accomplished during the initial booking process by law enforcement officers or at the intake process into a local jail simply by inquiring about place of birth.

Once local law enforcement is made fully aware of their integral role in the CAP, specific tasks must be assigned. Local law enforcement should furnish ICE a list of foreign-born individuals on a regular basis through a standardized process. Lists of identified individuals must be communicated to ICE via electronic means since ICE does not have the resources to have a physical presence at every local or county facility. Memorandums of Understandings between local law enforcement and ICE are needed to clarify local law enforcement’s release of identified criminal aliens. As the interviews suggest, the ad hoc procedures currently employed by each local jail makes for inconsistent results in identifying and detaining criminal aliens.

In addition to the list, identifying those suspected of being foreign born, court documents and conviction records within the inmate’s records at the prison or jail must be forwarded easing ICE’s preparation of a removal case. This will conserve ICE

²⁷⁹ Alice Lipowicz, “Pilot Program Expands Fingerprint Databases,” *Federal Computer Week*, November 13, 2008 at <http://www.fcw.com/online/news/154370-1.html> (accessed November 2008).

²⁸⁰ Ibid.

resources by obviating the need to expend ICE personnel to retrieve the requisite records from the local, county and state courts through which criminal aliens are prosecuted. An additional way to conserve ICE resources involves the exploration of a VTC system for local law enforcement that is compatible with ICE's current system. If ICE is able leverage VTC technology to interview identified inmates, it is not necessary for ICE personnel expend both time and resources traveling from jail to jail.

Interviewees identified an additional way to conserve ICE resources through obtaining contracted transportation for moving criminal aliens from jail to an ICE detention facility through IGSA's. While an Immigration Enforcement Agent (IEA) would be needed to affect the arrest and transfer of custody from the local law enforcement to ICE, an IEA is not necessarily needed to transport that criminal alien. IEAs who are relieved of having to perform transportation duties would then be free to further develop relationships with local law enforcement leading to the identification of more criminal aliens. Indeed, they would be free to develop relationships with probation offices in addition to local and county jails to ensure that criminal aliens who were not previously referred by local law enforcement to ICE would be identified. Development of personal relationships between ICE and local law enforcement can then become a main focus of IEAs rather than merely transporting criminal aliens.

Local and county officials should also develop a working relationship with ICE regarding the arrest of these identified inmates when they are ready for release from local and county custody. The interviewees confirmed that ICE resources would be maximized should release dates and times be limited to several days per week at only a set number of facilities. Given that the research revealed that an ICE office might have responsibility over numerous local and county jails, cross-sector coordination between these facilities will be necessary so that only prisons in close proximity to one another are releasing inmates to ICE's custody on the same day.

In addition to establishing a relationship with local law enforcement, ICE must commence a dialogue with EOIR about the possibility of having an Immigration Court that could travel to the various local and county facilities for removal hearings as part of

an IRP.²⁸¹ If a traveling court is too taxing on EOIR resources, the possibility of linking local and county jails to immigration courts such that immigration hearings could be held via VTC should be fully explored. Since the research revealed DRO's concern about quick release times of criminal aliens encountered at the local and county levels, a traveling or VTC immigration court could address those concerns. This exploration will necessarily involve local and county officials providing EOIR physical space to conduct hearings within the confines of the local facilities or having the necessary VTC equipment. It may also entail the request for funding for additional Immigration Judges to adjudicate all of the criminal aliens encountered with the expansion of CAP.

Similarly, a dialogue must be established with EOIR nationwide to develop standard practices and procedures regarding stipulated removals to address the problems identified in this thesis. No longer should individual Immigration Judges be allowed to simply not adjudicate stipulated removals. Immigration Judges should also not be allowed to refuse to conduct VTC hearings. With standard practices in place, the removal process will necessarily be streamlined.

It must be noted however, that with more criminal aliens being identified and placed into removal proceedings, a more effective and efficient means of removing them from the United States must be established. DRO officials confirmed that improvements have been made in ICE's ability to obtain travel documents from certain foreign countries – mainly Central American countries. More remains to be done.

The DRO interviews confirm that there are certain countries with which the United States does not have diplomatic relations and still other countries who refuse to accept the return of their criminal aliens. The Department of State must commence a dialogue with identified foreign countries such that they are more receptive to accepting the return of their criminal deportees. Incentives for countries to comply with ICE's request for travel documents should be explored to accomplish this goal.

²⁸¹ While the interviewees conceded that they were unaware of any existing dialogue between EOIR and ICE, these dialogues may be occurring at the headquarters level.

Consistent means for obtaining travel documents from consulates must be established to increase the speed with which such documents are issued. The interviewees confirmed that ICE does not commence obtaining a travel document until the alien has a final order of removal and is in ICE's custody. While waiting until a final order of removal is obtained is understandable, it is unclear why the alien must be in ICE custody. One DRO official attributed the delay to consulates requiring expiration dates on travel documents. It may be necessary for the Department of State to negotiate ICE's ability to obtain travel documents without expiration dates. If travel documents must in fact contain expiration dates, extending the validity of travel documents must be negotiated to afford DRO the maximum amount of time to remove the aliens in their custody.

With more criminal aliens having significant ties to this country being removed, there is a likelihood that these individuals will seek to reenter the United States. This thesis has revealed that illegal aliens who reenter the United States after having been removed currently face inconsistent criminal consequences and may not be prosecuted at all for this federal offense. While laws currently exist to prosecute these individuals, the U.S. Attorney's Offices nationwide must establish clear and consistent guidelines for prosecuting illegal re-entry cases. Aliens that return to this country after removal must face certain prosecution in federal court for their actions. To address workload issues, the U.S. Attorney's office should rely on the resources of the ICE agents who present these cases for prosecution allowing them to handle the large volume of cases. DRO officials confirm that ICE agents do all of the initial investigatory work prior to presenting a case to the U.S. Attorney's Office for prosecution. Indeed, the interviewees confirm that these are "easy" or "slam dunk" cases to be prosecuted. While the volume of potential cases is quite large, the U.S. Attorney's Office may be able to reach out to their local ICE Chief Counsel's office about the possibility of a SAUSA being assigned to prosecute these matters. No longer should an ad hoc approach from each U.S. Attorney office be tolerated. The U.S. Attorneys office nationwide must join ICE's CAP megacommunity to ensure that aliens who return to this country after removal are criminally prosecuted.

ICE must encourage the expansion of its Rapid REPAT program with states that do not already have a similar program in existence. With outreach to the states in this area, ICE will ensure the growth of its CAP megacommunity. Those interviewed confirm that such incentives ease the removal process considerably. While criminal aliens see the benefit of agreeing to removal to get out of jail at an earlier date, states must be educated regarding the financial benefits of such programs. Since the enactment of legislation will necessarily take time, the process must begin now. By enacting Rapid REPAT type legislation similar to what already exists in New York, Arizona, Puerto Rico, Rhode Island and Georgia, the cost of litigating the removal of criminal aliens will decrease, further overcoming the resource hurdle while simultaneously uniting the vested stakeholders and megacommunity members in ICE's mission to identify, detain and remove all criminal aliens.

Finally, ICE's 287(g) program should be expanded to provide more local law enforcement with immigration officer capabilities. Only a small portion of DRO officials interviewed confirmed the presence of 287(g) local law enforcement within their jurisdiction. However, all those interviewed confirmed that having local law enforcement act as immigration officers is a force multiplier that is of low cost to ICE. 287(g) authority puts boots on the ground where ICE does not have a presence. The full potential of this twelve-year-old statute has not been realized. The conservation of ICE resources can best be accomplished through full utilization of the 287(g) program. Again, the 287(g) program further unites vested stakeholders into the megacommunity of ICE's Criminal Alien Program.

VII. FINAL THOUGHTS

The creation of a megacommunity amongst the stakeholders involved in the CAP should be included in U.S. counterterrorism strategy. An effective and efficient strategy for the removal of criminal aliens from the United States must be explored. There are some involved in counterterrorism efforts that currently do not recognize the removal of criminal aliens as vital to homeland security efforts. ICE's Secure Communities initiative appears to be on the right course to developing a long term plan for the efficient and effective removal of criminal aliens. It sets forth a bold vision for ICE's critical role in future of Homeland Security.

By developing partnerships within the law enforcement community, all involved will maximize the potential resources available in pursuit of the common goal of removing criminal aliens from the United States. Local communities will undoubtedly benefit from the removal of these criminals simply by making their streets safer for their residents. The potential for prisoner radicalization will be eliminated. The funding of terrorist activity through criminal acts will be disrupted. ICE will move closer to achieving their goals of securing the homeland with the removal of these criminals. Securing our homeland against the dangers of criminal aliens is the overriding goal that will unite all parties and drive the development of ICE's CAP at every local and county jail.²⁸²

²⁸² The opinions expressed herein are solely those of the author in her individual capacity, and do not necessarily represent the views of the Immigration and Customs Enforcement, Department of Homeland Security, or the U.S. government.

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